LAW OFFICE OF
Marc Elliot Grossman
CITIZENS BUSINESS BANK BUILDING
818 N. Mountain Avenue, Suite 111
Upland, California 91786
Telephone (909) 608-7426
FACSIMILE (909) 949-0119
Email: marcgrossman@cia.net

April 7, 2011

William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

RECEIVED
APR 11 2011
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Re: Cate v. Pirtle, No. 10-868

Dear Mr. Suter:

I am in receipt of your letter of March 28, 2011, requesting this office to file a response to the petition for writ of certiorari. This office was retained to represent Mr. Slater in the district court, which granted his petition for writ of habeas corpus (case No. 08-00571, E.D. Cal.). The U.S. Court of Appeals for the Ninth Circuit affirmed the district court judgment (case No. 09-17784).

After being discharged from prison and parole, Mr. Slater moved to Las Vegas, Nevada. As partially verified in the attached letter from Kindred Hospitals, Mr. Slater has been comatose since being involved in an automobile accident approximately three and one-half months ago. Mr. Slater continues to be unresponsive and unable to communicate.

The attached letter also verifies that Mr. Slater is financially indigent. Accordingly, an application has been tendered for Nevada Medicaid. I have completed the attached motion for leave to proceed in forma pauperis on behalf of Mr. Slater based on information currently available to me.

Being familiar with Mr. Slater's case and the subject of the above-referenced petition for a writ of certiorari, I am capable of, and willing to assist Mr. Slater by filing a response to the petition. However, due to Mr. Slater's condition, I prefer to await further direction and authorization from the Court.

Respectfully submitted,

Marc Elliot Grossman

Kindred Hospitals
of Las Vegas

4/6/11

Marc Elliot Grossman, Attorney At Law
818 N. Mountain Av. Ste 111
Upland, CA. 91786

RE: Michael Slater

To: Attorney Grossman:

This letter is to serve as verification that Michael Slater has been hospitalized at Kindred Sahara Hospital since December 22, 2010 with Acute Respiratory Failure. At the time of his admission, Mr. Slater was on a ventilator. At this time, he has been weaned down to a tpiece. Despite the fact that he is no longer on the ventilator, Mr. Slater remains unresponsive and unable to communicate. He is incapacitated and unable to make any decisions on his own behalf. He is indigent and reportedly does not have a source of income. A Nevada Medicaid application has been started on his behalf.

If you have any questions, please feel free to contact Pamela Lambey, social work case manager, at (702) 352-9363.

Thank You,

Pamela Lambey LSW

Pamela Lambey, LSW
Licensed Social Worker

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Email: marcgrossman@uia.net

April 13, 2011

William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001

Re: Cate v. Pirtle, No. 10-868

Dear Mr. Suter:

Following a telephone conversation with Mr. Stasik today, we respectfully request (1) a thirty day extension of time in which to file a response to the petition; and (2) based on our letter to the Court dated April 7, 2011, and the documents submitted therewith, that Mr. Slater be afforded in forma pauperis status.

Also, in response to a query from Mr. Stasik, we have been in touch with Anthony Sneed, the respondent in an associated case, and would accept the court's appointment as his counsel; however, we cannot do so on a pro bono basis.

Respectfully submitted,

Marc Elliot Grossman
Counsel for Michael Slater

APR. 5. 2011 4:31PM

ORIGINAL

NO. 3917 P. 1

Supreme Court, U.S.
FILED
MAY 13 2011
OFFICE OF THE CLERK

No. 10-868

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Craig Sluter — ~~PETITIONER~~ RESPONDENT
(Your Name)

VS.

_____ — RESPONDENT(S)

MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The petitioner asks leave to file the attached petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[ ] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

_____

_____

☒ Petitioner has **not** previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

_____
(Signature)

MARC Elliot Grossman, Esq.
For Michael Craig Sluter

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, Michael Craig Slufer, am the ~~petitioner~~ Respondent in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	Average monthly amount during the past 12 months		Amount expected next month	
	You	Spouse	You	Spouse
Employment	$ 0-0-	$	$ -0-	$
Self-employment	$ -0-	$	$ -0-	$
Income from real property (such as rental income)	$ -0-	$	$ -0-	$
Interest and dividends	$ -0-	$	$ -0-	$
Gifts	$ -0-	$	$ -0-	$
Alimony	$ -0-	$	$ -0-	$
Child Support	$ -0-	$	$ -0-	$
Retirement (such as social security, pensions, annuities, insurance)	$ -0-	$	$ -0-	$
Disability (such as social security, insurance payments)	$ -0-	$	$ -0-	$
Unemployment payments	$ -0-	$	$ -0-	$
Public-assistance (such as welfare)	$ -0-	$	$ (Applied For)	$
Other (specify): _____	$	$	$	$
Total monthly income:	$ -0-	$	$ -0-	$

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
None Known			$ —0—
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
			$
			$
			$

4. How much cash do you and your spouse have? $ —0—
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A		$	$
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value

☐ Other real estate
Value

☐ Motor Vehicle #1
Year, make & model
Value

☐ Motor Vehicle #2
Year, make & model
Value

☐ Other assets
Description
Value

No Assets Known

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE KNOWN	$_____	$_____
_____	$_____	$_____
_____	$_____	$_____

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NONE KNOWN	_____	_____
_____	_____	_____
_____	_____	_____

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ -0-	$_____
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ -0-	$_____
Home maintenance (repairs and upkeep)	$ -0-	$_____
Food	$ -0-	$_____
Clothing	$ -0-	$_____
Laundry and dry-cleaning	$ -0-	$_____
Medical and dental expenses	$ -0-	$_____

	You	Your spouse
Transportation (not including motor vehicle payments)	$ -0-	$
Recreation, entertainment, newspapers, magazines, etc.	$ -0-	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ -0-	$
Life	$ -0-	$
Health (Applied For Medic Aid. Medical Assistance)	$ -0-	$
Motor Vehicle	$ -0-	$
Other:	$ -0-	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify):	$ -0-	$
Installment payments		
Motor Vehicle	$ -0-	$
Credit card(s)	$ -0-	$
Department store(s)	$ 0-0	$
Other:	$	$
Alimony, maintenance, and support paid to others	$ -0-	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ -0-	$
Other (specify):	$ -0-	$
Total monthly expenses:	$ -0-	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:
previously, Marlene Trawler Paid Legal Fees IN MY behalf to Attorney Marc E. Grossman.

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☑ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.
Please See attached Letters

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 4-7, 2011

_____ *
(Signature)

*Please see attached letters

No. 10-868

IN THE

SUPREME COURT OF THE UNITED STATES

Michael Craig Slater ~~PETITIONER~~ Respondent
(Your Name)

VS.

_____ — RESPONDENT(S)

PROOF OF SERVICE

I, Joseph Wasko, do swear or declare that on this date, April 7, 2011, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and ~~PETITION FOR A WRIT OF CERTIORARI~~ on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:
(1) JENNIFER ANNE Neill, 1300 I ST. #125, P.O. Box 944255, SACRAMENTO, CA 94244
(2) ANN C. McCLINTOCK, 801 I St., 3rd Fl., SACRAMENTO, CA 95814
(3) DAVID W. Shapiro, 1999 Harrison St. # 900, OAKLAND, CA 94612
(4) ~~Margaret L. Littlefield, P.O. Box 337, Bolinas, CA 94924~~
(5) ANTHONY SNEED, 627 E. 9th Av., Los Angeles, CA 90002

I declare under penalty of perjury that the foregoing is true and correct.

Executed on April 7, 2011

Joseph Wasko
(Signature)

DECLARATION OF SERVICE BY MAIL

Case: **Matthew Cate, et al., Petitioners v. John Pirtle, et al., Respondents**
Case No. 10-868, United States Supreme Court

I declare that I am a citizen of the United States. I am over the age of 18 and am not a party to the within title cause.

On April 20, 2011, I served copies of the attached documents:

Letter of April 7, 2011, with 8 pages attached to the Supreme Court and a letter of April 13, 2011, to the Supreme Court

on the parties listed below by enclosing same in an envelope to which adequate postage was affixed, and depositing same at the United States Post Office in Walnut, California for mailing.

Attorney General
1300 I Street, Suite 125
P.O. Box 944255
Sacramento, California 94244-2550

I declare, under penalty of perjury, that the facts I have stated above are true and correct.

Dated: April 20, 2011, at Walnut, California.

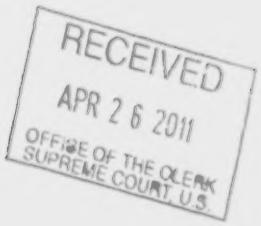
Joseph Worth

Declarant

LAW OFFICE OF
Marc Elliot Grossman
CITIZENS BUSINESS BANK BUILDING
818 N. Mountain Avenue, Suite 111
Upland, California 91786
Telephone (909) 608-7426
FACSIMILE (909) 949-0119
Email marcgrossman@juno.net

April 7, 2011

William K. Suter, Clerk
Supreme Court of the United States
Washington, D.C. 20543-0001



Re: Cate v. Pirtle, No. 10-868

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Marc Elliot Grossman

Kindred Hospitals
of las Vegas

4/6/11

Marc Elliot Grossman, Attorney At Law
818 N. Mountain Av. Ste 111
Upland, CA. 91786

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Thank You,

Pamela Lambey, LSW
Licensed Social Worker

ORIGINAL

ORIGINAL

Supreme Court, U.S.
FILED
MAY 13 2011
OFFICE OF THE CLERK

No. 10-868

In The Supreme Court of the United States

MATTHEW CATE, *Petitioner, et al.*

v.

MICHAEL CRAIG SLATER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT SLATER'S BRIEF IN RESPONSE TO PETITION

RECEIVED
MAY 18 2011
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MICHAEL CRAIG SLATER
c/o Marc Elliot Grossman
818 N. Mountain Avenue, Suite 111
Upland, California 91786

Respondent
In Propria Persona
In Forma Pauperis

QUESTION PRESENTED

When a state creates a liberty interest which mandates a prisoner's release from prison when to do so no longer poses an unreasonable risk of danger to public safety, does the substantive component of the Due Process Clause protect the prisoner from a decision by the state's parole board which denies parole but fails to set forth any evidence of such a risk?

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15 CCR § 2402 2

LIST OF PARTIES

Multiple Petitioners and Respondents have been named in the petition for writ of certiorari.

Petitioner Matthew Cate, Secretary of the Department of Corrections and Rehabilitation, has custody of the named Respondents confined to prison, and constructive custody of Respondents John H. Pirtle and Anthony Sneed, who are on state parole. Respondent Robert Johnson is on federal supervised release pending disposition of this action. Respondent Michael Slater is not in custody.

Warren Hardy, a warden, does not appear to be a Petitioner because he no longer has custody of Anthony Sneed.

No. 10-868

In The Supreme Court of the United States

MATTHEW CATE, *Petitioner, et al.*

v.

MICHAEL CRAIG SLATER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENT SLATER'S BRIEF IN RESPONSE TO PETITION

STATEMENT OF THE CASE AND FACTS

On October 27, 2005, the California Board of Parole Hearings ("Board") denied parole to Respondent Michael Craig Slater ("Slater"). Appendix, p. 53. Slater was serving a state prison term of 15 years to life with the possibility of parole for a 1988 second-degree murder plus a determinate 2-year weapon enhancement term. Appendix, p. 3. Prior to the hearing the State's psychologist performed a forensic evaluation and determined that the current risk of danger posed by Slater's parole was "less

than that of the average citizen"; the previous state forensic assessment reached the same conclusion. Appendix, pp. 70, 76.

The Board was mandated by law to grant Slater parole if to do so would not create "an unreasonable risk of danger" to public safety. Cal. Penal Code § 3041[1]; 15 CCR § 2401, 2402(a).[2] The Board based its contrary decision on two findings: the immutable facts of Slater's 17-year old commitment offense, and a similarly immutable 5-year old minor rule infraction (the only one Slater committed during his imprisonment) for "tenting," i.e., drying his clothing by draping it over his bunk. Appendix, p. 55.

The Board (1) failed to set forth in its decision any evidence suggesting, contrary to its forensic expert's determination, that Slater's parole would pose an unreasonable (or *any*) risk to society, and (2) failed to articulate a rational nexus from the commitment offense by which its only other finding (Slater's single rule infraction) would drastically elevate his

---

[1] § 3041 provides, in pertinent part, that the Board "shall set a release date unless … consideration of the public safety requires a more lengthy period of incarceration …"

[2] "15 CCR" references sections in title 15, Division Two ("California Board of Parole Hearings"). § 2401 requires the Board to set a parole date if it finds the prisoner "suitable" for parole. § 2402(a) requires a finding of suitability unless "the prisoner will pose an unreasonable risk of danger to society if released from prison."

negligible current parole risk, determined by its forensic expert who considered that fact, to that level. The California Supreme Court mandates that the Board (or Governor) is precluded from denying parole without meeting those two requirements. *In re Lawrence*, 44 Cal.4th 1181, 1226-1227 (2008) ("*Lawrence*").

The Court has determined that a liberty interest is bestowed on a state prisoner like Slater by a statute worded in "shall … unless" terms, like Penal Code § 3041, which mandates a specified decision unless a specified predicate is met. *Greenholtz v. Inmates of Nebraska Penal and Correctional Complex*, 442 U.S. 1, 12 (1979) ("*Greenholtz*"); *Board of Pardons v. Allen*, 482 U.S. 369, 381 (1987). The Court recently placed California's parole statute in that category. *Swarthout v. Cooke*, 131 S.Ct. 859, 862 (2011) ("*Cooke*").

The Court has also held that the substantive component of the Due Process Clause requires a state administrative agency like the Board, in making a decision adversely affecting a prisoner's parole release date, to set forth at least "some evidence" for its decision. *Superintendent v. Hill*, 472 U.S. 445, 453-455 (1985) ("*Hill*").

Slater filed a petition for writ of habeas corpus in state court claiming that the Board's decision denied due process under the Fourteenth

Amendment because it was unsupported by any evidence that his parole posed an unreasonable danger to society. The trial court denied the petition, as did the Court of Appeal and California Supreme Court. The trial court, the only state court to issue a reasoned decision, held that the Board's recital of the commitment offense facts alone was sufficient. Appendix, pp. 86-87.

Slater sought federal habeas relief. The United States District Court for the Central District of California granted the petition because the Board failed to set forth any evidence suggesting that Slater's parole currently poses an unreasonable danger to society, the district court held that its decision failed the some evidence standard of review and denied due process under *Greenholtz, Hill*, and *Lawrence*. Importantly, the district court decision was not based on the lack of procedural due process, but on the substantive component of the Due Process Clause. Because the record was devoid of evidence required to legally deny parole, the district court directed the Board to set and effectuate Slater's parole date absent new evidence of his unsuitability, and to apply the excessive time of his imprisonment to reduce his parole term. Appendix, pp. 93-104.

In the State's ensuing appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court judgment because the State did not contest the fact that no evidence supported the Board's 2005 decision.

Appendix, pp. 105-107. Again, the issue was one of substantive, not procedural due process.

As the Court has been informed, following Slater's release from prison and the discharge of his parole term, and after he went to live with his mother in Nevada, he suffered a severe head injury in an automobile accident and remains comatose in a nursing facility. Please see letter to Court dated April 7, 2011, and attachments.

RESPONDENT SLATER AGREES WITH PETITIONER AND URGES THE COURT TO *GRANT* THE PETITION FOR WRIT OF CERTIORARI

Although the Court's per curiam *Cooke* decision addressed a strictly *procedural* due process claim, its unwitting *hands-off-Ninth-Circuit* dictate has completely emasculated the Fourteenth Amendment's substantive due process requirements and produced widespread egregious (probably unintended) suffering. Hundreds of habeas decisions granting relief have been reversed by the Ninth Circuit pursuant to *Cooke*, and many of the former state prisoners involved are being returned to prison after successfully serving a portion of their parole terms, despite the fact that no evidence supported the Board's or Governor's decisions denying their paroles in any of these cases.

Whatever procedural due process was required or afforded Michael Craig Slater at his parole hearing was meaningless because the Board's decision lacked even a minimal evidentiary basis. Mr. Slater respectfully suggests that it is irrational to believe that on one hand, this Court held in *Hill* that federal habeas courts must insure that a state prisoner is afforded substantive due process by requiring a prison committee's decision – to extend the subject's prison term by reducing term credits for a disciplinary violation – to be supported by at least ***some* evidence**; while, on the other hand, the Court would preclude the same federal courts from insuring that the same State's parole board provides at least the same measure of substantive due process to protect the same prisoner against the preclusion of his or her prospective freedom of parole *altogether*, by means of decisions devoid of *any* evidence whatsoever. But that is precisely the state of affairs produced by per curiam *Cooke*.

> [T]he prohibition against deprivations of life, liberty, or property contained in the Due Process Clause of the Fourteenth Amendment extends beyond the command of fair procedures. It can no longer be controverted that due process has a substantive component as well… As a consequence, certain actions are prohibited no matter what procedures attend them.
>
> *County of Sacramento v. Lewis*, 523 U.S. 833, 856 (1998) (concur. opn.).

See *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992); *Collins v. Harker Heights*, 503 U.S. 115, 125-128 (1992); *Michael H. v. Gerald D.*, 491 U.S. 110 (1989); *DeShaney v. Winnebago County Dept. of Social Services*, 489 U.S. 189, 194-195 (1989) ["*DeShaney*"]; *Foucha v. Louisiana*, 504 U.S. 71, 72 (1992) ["Third, the substantive component of the Due Process Clause bars certain arbitrary, wrongful government actions regardless of the fairness of the procedures used to implement them"], citing *Zinermon v. Burch*, 494 U.S. 113, 125 (1990).

The Ninth Circuit has acknowledged:

> The Supreme Court has therefore long recognized that the Due Process Clause contains a substantive component that "bars certain arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.' " *Zinermon v. Burch*, 494 U.S. 113, 125, 110 S.Ct. 975, 108 L.Ed.2d 100 (1990) (quoting *Daniels v. Williams*, 474 U.S. 327, 331, 106 S.Ct. 662, 88 L.Ed.2d 662 (1986)).
>
> *Hess v. Board of Parole and Post-Prison Supervision*, 514 F.3d 909, 913 (9th Cir. 2008).

As have California's courts:

> The Supreme Court explained that the Fourteenth Amendment's due process clause not only guarantees fair process but also "includes a substantive component that 'provides heightened protection against government interference with certain fundamental rights and liberty interests.' " (*Troxel*, at p. 65,

120 S.Ct. 2054; see also *Dawn D., supra,* 17 Cal.4th at pp. 939-940, 72 Cal.Rptr.2d 871, 952 P.2d 1139.)

Charisma R. v. Kristina S., 175 Cal.App.4th 361, 387 (2009).

See also *O'Dea v. Bunnell,* 151 Cal.App.4th 214, 225 (2007) ["... the gravamen of a section 1983 claim based on the substantive component of the due process clause is "the 'deprivation of liberty' " resulting from "the State's affirmative act of restraining the individual's freedom to act on his own behalf." (citing *DeShaney, supra,* 489 U.S. at 200).].

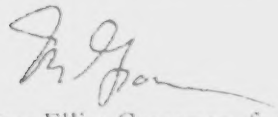
Slater's habeas petition and the district court's and Ninth Circuit's decisions were based on a total deprivation of *substantive* due process – a process by which the probability of parole in his circumstances by state law was extinguished arbitrarily by a parole board determination completely devoid of evidentiary support which would fail *any* standard of review.

CONCLUSION

The State's petition for writ of certiorari should be *granted* to permit appropriate briefing on the crucial substantive due process issue.

Dated: May 12, 2011

Respectfully submitted,



Marc Elliot Grossman, for
MICHAEL CRAIG SLATER
Respondent
In Propria Persona
In Forma Pauperis

PROOF OF SERVICE BY MAIL

Case: **Cate v. Slater, No. 10-868**

I declare that I am a citizen of the United States. I am over the age of 18 and am not a party to the within titled cause.

On MAY 13, 2011, I served copies of the attached

Respondent Slater's Brief in Response to Petition; Appendices

on the parties listed below by enclosing same in an envelope to which adequate postage was affixed, and depositing same at the United States Post Office in Walnut, California for mailing.

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I declare, under penalty of perjury, that the facts I have stated above are true and correct.

Dated: MAY 13, 2011 at Walnut, California

Joseph Wasko
Declarant

ORIGINAL

No. 10-868

In The Supreme Court of the United States

MATTHEW CATE, *Petitioner, et al.*

v.

MICHAEL CRAIG SLATER, *Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

APPENDIX TO RESPONDENT SLATER'S BRIEF

IN RESPONSE TO PETITION

MICHAEL CRAIG SLATER
c/o Marc Elliot Grossman
818 N. Mountain Avenue, Suite 111
Upland, California 91786

Respondent
In Propria Persona
In Forma Pauperis

SUBSEQUENT PAROLE CONSIDERATION HEARING

STATE OF CALIFORNIA

BOARD OF PAROLE HEARINGS

In the matter of the Life Term Parole Consideration Hearing of:

MICHAEL SLATER

CDC Number D-39052

INMATE COPY

CHUCKAWALLA VALLEY STATE PRISON

BLYTHE, CALIFORNIA

OCTOBER 27, 2005

4:38 P.M.

PANEL PRESENT:

Mr. Tom Sawyer, Presiding Commissioner
Mr. Ramon Estrada, Deputy Commissioner

OTHERS PRESENT:

Mr. Michael Slater, Inmate
Ms. Alexis Delagarza, Deputy District Attorney
Ms. Mary Ann Tardiff, Attorney for Inmate
Mr. Eric Penney, Assistant Classification Parole Representative
Correctional Officer Unidentified

CORRECTIONS TO THE DECISION HAVE BEEN MADE

_____ No See Review of Hearing
_____ Yes Transcript Memorandum

Elizabeth Scott Peters Shorthand Reporting

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P R O C E E D I N G S

DEPUTY COMMISSIONER ESTRADA: Okay. We are now on record.

PRESIDING COMMISSIONER SAWYER: This is a Subsequent Parole Consideration Hearing for Michael Craig Slater, S-L-A-T-E-R, CDC No. D as in David, 39052. Today's date is 10/27, 2005. The time is 4:38 in the afternoon. We are located at CVSP. The date received was 9/19, 1986. Life term started on 12/21 of '86. County of Commitment was Los Angeles. Murder in the second degree with the use of a firearm. Case No. A as in Adam, 092326. One count of 187 of the Penal Code, as well as 12022.5 of the Penal Code. Term is 15 to life plus 2. Minimum eligible parole date was 11/05, 1996. The hearing is being tape recorded. And for purposes of identification, each of us is required to state our first and last names spelling our last name. When it comes to the inmate's turn, if you can spell your last name and then also give us your CDC number as well. Okay? I'll start and I'll go to my right. Tom Sawyer, S-A-W-Y-E-R, Commissioner.

DEPUTY DISTRICT ATTORNEY DELAGARZA: Alexis Delagarza, D-E-L-A-G-A-R-Z-A, Deputy District Attorney, Los Angeles County.

MS. TARDIFF: Mary Ann Tardiff, T-A-R-D-I-F-F, attorney for Mr. Slater.

INMATE SLATER: Michael Slater, D-39052, S-L-A-T-E-R.

MR. PENNEY: Eric Penney, P-E-N-N-E-Y, Assistant Classification Parole Representative assisting the Board.

MR. ESTRADA: Ramon Estrada, E-S-T-R-A-D-A, Deputy Commissioner of Board of Parole Hearings.

PRESIDING COMMISSIONER SAWYER: There's a correctional peace officer in the room for security purposes. The record reflects that you signed BPT Form 1073 on 11/30 of '04. You indicate on here that you do not have any disabilities, Mr. Slater.

INMATE SLATER: That's right.

PRESIDING COMMISSIONER SAWYER: And you do not need help for your parole hearing. Can I pass this over to Ms. Tardiff? Thank you. Look at that and make sure that it's all right.

MS. TARDIFF: December 3rd of '04 is still correct, right?

PRESIDING COMMISSIONER SAWYER: Do you wear glasses, sir?

INMATE SLATER: Yes, but they're for reading.

PRESIDING COMMISSIONER SAWYER: For reading. Okay.

MS. TARDIFF: That's correct.

PRESIDING COMMISSIONER SAWYER: And you brought them with you today?

INMATE SLATER: Yes, I did.

PRESIDING COMMISSIONER SAWYER: Okay. And you can hear me okay?

INMATE SLATER: Yes.

PRESIDING COMMISSIONER SAWYER: All right. Can I waive the reading the ADA?

MS. TARDIFF: Yes.

PRESIDING COMMISSIONER SAWYER: Thank you. This hearing is being conducted pursuant to Penal Code Sections 3041 and 3042 and the Rule and Regulations of the Board of Prison Terms governing Parole Consideration Hearings for life inmates. The purpose of today's Hearing is to consider your suitability for parole. In doing so, we will consider the number -- the number and nature of the crimes you're committed for, your prior criminal and social history, your behavior and programming since your commitment. And we've had the opportunity to review your Central File, prior hearing transcript, and you will be given the opportunity to correct or clarify the record. We will consider your progress since your commitment and this your last hearing. Your updated counselor's report and

psychological report will also be considered. Any change in parole plans should be brought to our attention. We will reach a decision today and inform you of whether or not we find you suitable for parole and the reasons for our decision. If found suitable for parole, the length of your confinement will be explained to you. This hearing will be conducted in two phases. I will discuss with you the crime that you're committed for, your prior criminal and social history, your parole plans, and any letters of support or opposition that may be in your file. Deputy Commissioner Estrada will discuss with you the progress since your commitment, your counselor's report, and your psychological evaluation. Once that is concluded, the District Attorney, your attorney and you -- I'm sorry -- the District Attorney and your attorney will be given an opportunity to ask -- ask you questions. The questions from the District Attorney shall be asked through the panel, and you answer back to the panel. Do you understand?

INMATE SLATER: Yes.

PRESIDING COMMISSIONER SAWYER: Thank you.

PRESIDING COMMISSIONER SAWYER: Before we recess for deliberations, the District Attorney, your attorney and you will be given an opportunity to make a final statement regarding your parole suitability. Your statement should

be directed as to why you feel you are suitable for parole. We will then recess, clear the room and deliberate. Once we have completed our deliberations, we will resume the hearing and announce our decision. California Code of Regulations states that regardless of time served, a life inmate shall be found unsuitable for and denied parole if, in the judgment of the panel, the inmate would pose an unreasonable risk of danger to society if released from prison. You have certain rights. These rights include the right to a timely notice of this Hearing, the right to review your Central File, and the right to present relevant documents. Have the inmate's rights been met?

MS. TARDIFF: They have.

PRESIDING COMMISSIONER SAWYER: You also have the right to be heard by an impartial panel. Is there any objection to this panel, counsel?

MS. TARDIFF: No.

PRESIDING COMMISSIONER SAWYER: Thank you. You will receive a copy of our written [illegible] decision today. That decision is subject to review by the Decision Review Unit and by the entire Board meeting as a body. It will be [illegible] within 120 days. It's also

subject to review by the Governor. A copy of the tentative decision and a copy of the transcript will be sent to you. As of May 1st, 2004, there were major changes limiting your former to appeal Board decisions or actions directly to the Board. The old Board regulations were repealed. That policy is entitled Administrative Appeals, Correspondence and Grievances Concerning the Board of Prison Terms Decisions, and they are available at the prison law library. You are not required to admit your offense or discuss your offense if you do not wish to do so. However, this panel does accept as true the findings of the court, and you are invited to discuss the facts and circumstances of the offense if you desire. The Board will review and consider any prior statements you have made regarding the offense in determining your suitability for parole. Is there any confidential material, Commissioner Estrada, that will be used in this hearing?

DEPUTY COMMISSIONER ESTRADA: None.

PRESIDING COMMISSIONER SAWYER: Okay. I'm gonna pass the hearing checklist to you, Ms. Delgarza. If you could look at that and pass it on to me, Tariff.

DEPUTY DISTRICT ATTORNEY DELAGARZA: I

have received the documents. Thank you.

PRESIDING COMMISSIONER SAWYER: Thank you.

MS. TARDIFF: I have all these as well. Nothing further.

PRESIDING COMMISSIONER SAWYER: No additional documents?

MS. TARDIFF: Correct.

PRESIDING COMMISSIONER SAWYER: Any objections? Preliminary objections?

MS. TARDIFF: No.

PRESIDING COMMISSIONER SAWYER: Will the inmate be speaking with the panel?

MS. TARDIFF: Everything except for the commitment offense.

PRESIDING COMMISSIONER SAWYER: Okay. Would you raise your right hand, sir? Do you solemnly swear or affirm the testimony you're about to give in this Hearing will be the truth, the whole truth, and nothing but the truth?

INMATE SLATER: I do.

PRESIDING COMMISSIONER SAWYER: Thank you. Okay. I'm going to read the commitment offense from the April '05 calendar, in the offense summary, page 1.

"On 7-5 of 1982 at 3:00 a.m.,

West Hollywood Sheriff Officers

responded to Harper Avenue due to reports of an injured person. When officers arrived, they observed a victim who had a large amount of blood on the right side of his head. Paramedics arrived and transported the victim to Cedars Sinai Hospital. The victim was pronounced dead at 1:05 p.m. as the result of severe brain damage and a cardiac arrest. An investigation was conducted. Witnesses stated that inmate Slater arrived at the residence at approximately 9:50 a.m. on 7/9 of '85. He was allowed to enter and was led to a bedroom area where he sat for about three minutes. The victim, Gary Boice (phonetic), came a few minutes later. Slater quickly got up and stepped in front of Boice and prevented him from moving any further. Slater reached for a briefcase that he had had with him and pulled out a

grey revolver. He opened the cylinder of the revolver, spun it around, and closed it. He told the victim, 'This is what we do to people.' He pointed the gun at Boice's right temple, fired one round to the right side of the victim's head. Slater than said, "Oh, my God. Oh, my God. I'm sorry. I'm sorry.' Slater than fled, taking the gun and the briefcase."

In the inmate's version, he was afforded an opportunity to submit his version of his life crime. He stated that his version remains the same as stated from his previous hearing. Following is the verbatim account of the prisoner's version from the Subsequent Parole Consideration Hearing No. 3

"I took a taxi to Col's to pop [illegible] and possibly sell some drugs. We were talking in his bedroom with Carol, who had been sleeping on the [illegible] woke up, and walked in the bedroom door

on his way to the bathroom. Gil stopped him and they began to argue about money. With the taxi waiting downstairs, I soon became impatient. To put a stop to their arguing and allow me to finish up with Gil, I decided to scare Gary. Within their view, I removed all the bullets from my revolver except one. I feigned kind of a Russian Roulette by spinning the cylinder, while secretly watching to make sure the bullet was not in firing position. Then I stepped up to Gary and pointed the gun to his head. I said something to Gil along the lines of 'This is how to play.' And I pulled the trigger. To my shock, and everyone else's, the [redacted] struck Gary in the head, dropping him to the floor. [redacted] Gil to call an ambulance, [redacted]

immediately did. After I calmed down, I thought there wasn't anything I could do to help Gary, and I wasn't ready to turn myself over to the law. So I left with Gil and Jackie and fled the apartment. A couple days later, a friend informed me that poor Gary had died at the hospital as a result of my shooting him. After my arrest, I slowly returned to normal as the drugs left my system. Gary was actually a fun loving guy, full of life. As the years have passed, I spend a lot of time thinking about him. It's a big burden to carry around -- the knowledge that I robbed another's life. Some years ago, I managed to reach his mother through a friend's investigator. She agreed to receive a couple of letters from me. Of course, it was very difficult to write her. I didn't want to do more harm than I had already done.

On the other hand, I felt some healing and closure was coming from us communicating. She turned out to be a wonderful Christian woman. She expressed it was painful to hear from me, but that it was important for her as it was important for me too. She sent a picture of Gary's daughter and told me all about her. It was emotional for me to receive the photo. I didn't even know that Gary had a child until the letter. Because of my doing, Christie grew up fatherless. I carry remorse and pain knowing the suffering that I've caused for the rest of my days."

Okay. Let's look at his rap sheet here. Juvenile record -- none. We have 3/20 of 1980, 459 burglary. What was that about? Back in 1980. Do you remember?

INMATE SLATER: That might have been the lab where I worked.

PRESIDING COMMISSIONER SAWYER: The lab?

INMATE SLATER: Yeah. I worked in a

laboratory.

PRESIDING COMMISSIONER SAWYER: What kind of lab?

INMATE SLATER: It was a lab where we did research on the effects of cocaine.

PRESIDING COMMISSIONER SAWYER: To research animals?

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: You went in after -- what did you steal? Some dope?

INMATE SLATER: Exactly.

PRESIDING COMMISSIONER SAWYER: Because you wouldn't be stealing rats, right?

INMATE SLATER: No.

PRESIDING COMMISSIONER SAWYER: Okay. 2/25 of '83. LAPD - 211 robbery. You were a passenger in a car which was taken in a robbery -- that the robber was caught and you were released. Placerville. Possession of drugs. Charges were released or dismissed. One 350. That was 1983. In '83 was a disposition -- your house was staked out and under surveillance. You were arrested in the matter, but it was thrown out due to an illegal search.

INMATE SLATER: I'm sure that's right. I don't actually remember what it was about.

PRESIDING COMMISSIONER SAWYER: It was a

transportation of sales?

INMATE SLATER: Well, do they have the address on there?

PRESIDING COMMISSIONER SAWYER: No. In 1984, possession of dangerous drugs. You were living on Ogden in West Hollywood. Police responded to a burglary, found a small quantity of narcotics in your hands.

INMATE SLATER: That's correct.

PRESIDING COMMISSIONER SAWYER: What was the disposition? Oh, it was rejection.

INMATE SLATER: Correct.

PRESIDING COMMISSIONER SAWYER: Then another '84 possession of controlled substance for sale -- 11378. What kind of substances were you dealing with? Coke?

INMATE SLATER: No. Originally I got hooked to Coke -- when I was at the lab, as a matter of fact, I began using. By 1984, I was using methamphetamine, and I was no longer using cocaine.

PRESIDING COMMISSIONER SAWYER: Uh-huh.

INMATE SLATER: I was selling a small amount of drugs to support my habit basically.

PRESIDING COMMISSIONER SAWYER: Uh-huh. Were you working?

INMATE SLATER: I worked on and off. By

that date, I may not have been working at all by then. Over the years, I worked less and less.

PRESIDING COMMISSIONER SAWYER: Because of the drugs?

INMATE SLATER: Yes.

PRESIDING COMMISSIONER SAWYER: You weren't the most dependable guy?

INMATE SLATER: No.

PRESIDING COMMISSIONER SAWYER: Okay. Okay. It says you were -- it says you were a house guest who took Quaaludes -- you had a house guest who took Quaaludes in order -- in an effort to kill herself. You were arrested and spent 21 days in County Jail before the case was dropped?

INMATE SLATER: That's true.

PRESIDING COMMISSIONER SAWYER: Did she kill herself?

INMATE SLATER: No, sir. Thank God. She returned to Indiana to be with her mom.

PRESIDING COMMISSIONER SAWYER: Okay. Still in touch with her?

INMATE SLATER: No. We've lost contact.

PRESIDING COMMISSIONER SAWYER: Okay. It says here you were the elder of two children, and were born in 1959 in Los Angeles, the same residence in West L.A. for your entire

childhood. When you were age 11, your parents were divorced. Your mother is remarried. And when you were 15, you began to experiment with drugs when you attended junior high school. Graduated from high school in '72, enlisted in the Army, served as a pharmacy specialist from '72 to '75, and you were honorably discharged. You entered Santa Monica College and the University of California Los Angeles for a period of four years. His area of study was in physics, but you were unable to complete your desired degree. How far did you get?

INMATE SLATER: I'd say my -- I successfully completed my junior year, but I started using cocaine at the lab in my senior year, so that was a wash.

PRESIDING COMMISSIONER SAWYER: Yeah. You were married in 1982?

INMATE SLATER: Yes, I was.

PRESIDING COMMISSIONER SAWYER: Divorced two years later. And you were selling drugs to support yourself prior to your arrest for the commitment offense. Living in a hotel for a period of three to four months. So you were pretty much an unstable guy, huh?

INMATE SLATER: Well, I've always had an excellent family support. I have been blessed

with a tremendous family. And I have -- I still have some of my childhood friends. So there was a period of a few years when I was using drugs that I was an unreliable person.

PRESIDING COMMISSIONER SAWYER: Okay. Let's see what your future plans have in store. Reside with your father or mother. Both have offered residence and support. That's Ernest Slater, your father, lives in West Hollywood. Is it an apartment? 305 -- No. 305?

INMATE SLATER: Condominium.

PRESIDING COMMISSIONER SAWYER: Condo? And your mother lives in Las Vegas. Are those addresses still current?

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: Your father has offered you a job in his company, Slater Rentals, North King Road, Los Angeles. What does he rent?

INMATE SLATER: Commercial property.

PRESIDING COMMISSIONER SAWYER: Okay. What would you be doing for him?

INMATE SLATER: Anything that he wanted me to do. I'd be learning the business.

PRESIDING COMMISSIONER SAWYER: And what kind of salary and benefits would you be getting?

INMATE SLATER: We haven't discussed that -- salary and benefits. I'm sure it would be adequate to get by.

PRESIDING COMMISSIONER SAWYER: Because he's your father?

INMATE SLATER: Because he's out to see me succeed.

PRESIDING COMMISSIONER SAWYER: Uh-huh. Fathers do that. Mothers do that. He'd help you here, but he can't, right? Other than providing you with a job

INMATE SLATER: That's true.

PRESIDING COMMISSIONER SAWYER: Parents are suckers for that. Parents are beautiful. Oldest game in the world. Think they're gonna take the house if they don't get the money. Okay. I have a letter from your mother reiterating her support if you're paroled to your father or her in Las Vegas, hoping and praying you can -- "Michael could now manage my investments, which he knows all about. I'm up in the age where he could take care of -- take it over for me." How old is your mother?

INMATE SLATER: She's in her early 70's.

PRESIDING COMMISSIONER SAWYER: "Family needs him and he needs us." That sounds very supportive. Okay. I have another letter from

Slater Rentals. It's your father. He's 76. His son, Michael. Do you have any siblings?

INMATE SLATER: I have a sister.

PRESIDING COMMISSIONER SAWYER: Sister?

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: Does she work in the business -- family business?

INMATE SLATER: No, she doesn't. She's in -- she's in accounting.

PRESIDING COMMISSIONER SAWYER: And he's still taking care of his 96-year-old mother?

INMATE SLATER: That's right.

PRESIDING COMMISSIONER SAWYER: All right. So you've got some good genes going on here.

INMATE SLATER: Yes, I do.

PRESIDING COMMISSIONER SAWYER: So his mother's 20 years older than he is. Wow.

INMATE SLATER: Actually, she's -- she's on the (indiscernible).

PRESIDING COMMISSIONER SAWYER: Is she? Where does she live?

INMATE SLATER: She lives in Kings Row.

PRESIDING COMMISSIONER SAWYER: Okay. It says here he owns nice income property "Michael has helped in the past. I'm offering him a well paying job." Also live in a

beautiful Westside condo. Offers a lot of love and support. That's pretty good. That's all we have in that area. Do you have -- do you have any other support letters or -- or you know, like from your sister and other friends on the outside that would be part of your support group to make sure you are successful?

INMATE SLATER: In the past I had -- I've had my friend Rocky, who owns property in Las Vegas write the Board. And my cousin, who's a teacher in Los Angeles, has already -- has contacted the Board also.

PRESIDING COMMISSIONER SAWYER: Uh-huh. In the past?

INMATE SLATER: Yes.

PRESIDING COMMISSIONER SAWYER: Okay. I'm going to turn you over to Commissioner Estrada to talk about your post-conviction factors.

DEPUTY COMMISSIONER ESTRADA: Thank you. Good afternoon, Mr. Slater.

INMATE SLATER: Good afternoon, Mr. Estrada.

DEPUTY COMMISSIONER ESTRADA: I've (indiscernible) post-conviction information through your Central File and your evaluation report we read from the April 2005 calendar by

Correctional Counsel I (indiscernible) September 19th, 2003 to the present, and the psychological evaluation dated February 7th, 2005 by Dr. Bob Ohrling. At the time of Mr. Slater's last Parole Consideration Hearing on April 30th, 2004, he was housed at Chuckwalla Valley State Prison. The Board denied parole for one year and recommended that the inmate remain disciplinary free and no more 115s or 128s, participate in self-help when available, and remain disciplinary free. Now, Mr. Slater, your Classification Score at your last Hearing was 90 and continues to be 90, correct?

INMATE SLATER: Yes it does, sir.

DEPUTY COMMISSIONER ESTRADA: And your custody level of Medium-A continues to be Medium-A, correct?

INMATE SLATER: Yes, sir.

DEPUTY COMMISSIONER ESTRADA: Now, since you arrived at State Prison, you have completed a few vocational courses. 1/9/1991 you completed optical technology 1992, a certified contact lens technician?

INMATE SLATER: Yes, sir.

DEPUTY COMMISSIONER ESTRADA: Okay. Very good. March of 2000 you completed vocational plumbing?

INMATE SLATER: Yes, sir.

DEPUTY COMMISSIONER ESTRADA: Okay. Now there's an indication that you completed vocational roofing, but I don't have any certificates of that.

INMATE SLATER: Roofing and carpentry, actually.

DEPUTY COMMISSIONER ESTRADA: Well, I checked off carpentry, and I didn't see anything that you completed that -- not even an education slip or a certificate.

INMATE SLATER: I thought that you had the roofing.

DEPUTY COMMISSIONER ESTRADA: I guess it's the [indiscernible] here. I thought that you would have a certificate. That was April 30th, 2004. Do you have anything?

INMATE SLATER: No, sir -- I don't. But it surprises that you don't have the roofing.

DEPUTY COMMISSIONER ESTRADA: Yeah. I looked at it just before I got on.

INMATE SLATER: Because that's always been there, I think.

DEPUTY COMMISSIONER ESTRADA: I'll check. Do you have a copy?

INMATE SLATER: I didn't make a copy -- no. That's never been questioned before.

DEPUTY COMMISSIONER ESTRADA: Okay. Because I don't know what you completed.

INMATE SLATER: Carpentry. The carpentry class closed up -- closed down, rather, right at the end there.

DEPUTY COMMISSIONER ESTRADA: End of what?

INMATE SLATER: Right -- I was one of -- I was in the group of the final students, so there was some --

MS. TARDIFF: What year?

INMATE SLATER: I believe it was just about three years ago, because I've had my current job for just over two and a half years.

DEPUTY COMMISSIONER ESTRADA: Okay. So there's nothing -- there's nothing (indiscernible). Okay. (indiscernible).

INMATE SLATER: Yes.

DEPUTY COMMISSIONER ESTRADA: And you graduated in 1972?

INMATE SLATER: That's correct.

DEPUTY COMMISSIONER ESTRADA: So you have a diploma?

INMATE SLATER: Yes, I do.

DEPUTY COMMISSIONER ESTRADA: Is it in here? I didn't see it.

INMATE SLATER: I don't know whether it

is or not.

DEPUTY COMMISSIONER ESTRADA: Okay. I see that. Now you are participating in a course (indiscernible) distance learning, and there's a chrono to that.

INMATE SLATER: Okay.

DEPUTY COMMISSIONER ESTRADA: Are you taking classes right now?

INMATE SLATER: Yes, I am.

DEPUTY COMMISSIONER ESTRADA: What are you taking?

INMATE SLATER: Four classes.

DEPUTY COMMISSIONER ESTRADA: What are they?

INMATE SLATER: Management, accounting, health and business mathematics.

DEPUTY COMMISSIONER ESTRADA: Okay. And this is going for your AA or BA?

INMATE SLATER: AA.

DEPUTY COMMISSIONER ESTRADA: Okay. And when will you finish?

INMATE SLATER: In December.

DEPUTY COMMISSIONER ESTRADA: Okay. You should get that certificate.

INMATE SLATER: Okay.

DEPUTY COMMISSIONER ESTRADA: On September 17, 2004, you did participate in

recreational maintenance (indiscernible) work supervisor's report. Are you still working there?

INMATE SLATER: Yes, I am.

DEPUTY COMMISSIONER ESTRADA: Okay. Very good. Now (indiscernible) some classes on 10/25/04 you completed self-confrontation class, and you have (indiscernible). Very good. And on January 30th, 2000, you completed a 13-week anger management program. And I saw a chrono on July 8th, 2005, you completed the four-week anger management class?

INMATE SLATER: That's right.

DEPUTY COMMISSIONER ESTRADA: Very good. Now there's also been some chronos here -- quarterly chronos for your participation in -- is it AA?

INMATE SLATER: Yes, sir.

DEPUTY COMMISSIONER ESTRADA: And (indiscernible) the dates of the chronos, it indicates the number of AA meetings that you participated in during that period of time. I have July 22nd, 2004 you attended 12 AA meetings. October 25th, 2004, 12 AA meetings. December 31st, 2004, 10 AA meetings. 4/1/05, 12 AA meetings. 7/26/05, 12 AA meetings. August 25th, 2005, 12 AA meetings. And another one of

October 10th, 2005, 7 AA meetings. Are you still going to AA?

INMATE SLATER: Yes, sir -- I am.

DEPUTY COMMISSIONER ESTRADA: How often do you go?

INMATE SLATER: I'm trying to go weekly.

DEPUTY COMMISSIONER ESTRADA: Weekly? Okay. Very good. Do you know your steps?

INMATE SLATER: I bet you do.

DEPUTY COMMISSIONER ESTRADA: I do now. Do you know your steps?

INMATE SLATER: I think I do. I should know some.

DEPUTY COMMISSIONER ESTRADA: Okay. There was also a quarterly chrono regarding your participation as a volunteer to work in the literacy program.

INMATE SLATER: That's right.

DEPUTY COMMISSIONER ESTRADA: Is it because you are a coordinator? (indiscernible)

INMATE SLATER: Help guys learn to prepare for the GED, or guys that just want to improve their -- with their studies can come for help.

DEPUTY COMMISSIONER ESTRADA: Okay.

PRESIDING COMMISSIONER SAWYER: Do you speak Spanish?

INMATE SLATER: A little bit. Not as well as I would like to.

DEPUTY COMMISSIONER ESTRADA: And that's basically all the things -- December 31st, '04, which (indiscernible) October through December '04, inmate Slater served as a volunteer tutor in the literacy program. On 1/1/04, he became the literacy coordinator from (indiscernible). Are you still the coordinator?

INMATE SLATER: Yes, sir.

DEPUTY COMMISSIONER ESTRADA: Okay. It says he tutors under his charge in the academic area and is to be commended for his efforts in extending his skills to his fellow man. And basically they all the say the same thing. The date of the chrono, which is 6/30, 2004, September 30th, 2004, December 31st, 2004, March 31st, 2005 and June 30th, 2005. And are you still doing this?

INMATE SLATER: Yes, sir.

DEPUTY COMMISSIONER ESTRADA: Very good. And then there is also one other chrono. It indicates (indiscernible) a full-time student in (indiscernible) distance learning program for 12 months. He has participated in a voluntary program in addition= to his regular work assignment. He maintained a 3.0 average and

follows all the rules for participation (indiscernible). I commend him for his hard work and positive attitude. And this is by J. Spitt, S-P-I-T-T, academic teacher at Chuckawalla Valley State Prison. And that's dated October 22nd, 2004. Now, since you arrived in the State Prison, you have chronos pending. Back in the year 2000, you received two counseling chronos on December 30, 2000 and (indiscernible) 20, 2000 for (indiscernible). And then October 1st, 2000, there's a 115. But you haven't had any 115s for five years, correct?

INMATE SLATER: That's right.

DEPUTY COMMISSIONER ESTRADA: Any comments as to the rest of this?

INMATE SLATER: No. No comment.

DEPUTY COMMISSIONER ESTRADA: Now (indiscernible) CCI (indiscernible) -- CCI indicates that prior to (indiscernible) you could benefit from remaining disciplinary free, continuing to attend college courses, and complete (indiscernible) therapy. And your psychological report by Dr. Orhling -- he does indicate a diagnosis of Axis 1 history of adult antisocial behavior, and history of substance abuse, and Axis II, (indiscernible). It

indicates that Mr. Slater appeared to be honest in his (indiscernible). This inmate had experienced a period of paranoia, auditory hallucination, and addiction that he thought that he would be able to live with for the rest of his life. He has good insight into his behavior and the emotionality that went with it. Today, this inmate has been able to achieve a (indiscernible) and has excelled vocationally, academically during his 20 years of incarceration. Within a controlled setting, it appears as if inmate's propensity for violence is less than that of the average inmate, providing he remains substance free and participates in AA and NA meetings with a sponsor and periodic blood tests. And within the community, it would be also less than that of the average citizen. He has also gained knowledge and insight into the danger of drugs, and in a less controlled setting, such as (indiscernible), this inmate can be considered to hold (indiscernible). The evaluator will recommend that when the inmate paroles, he participate in AA and NA meetings, be given a sponsor, and periodic blood testing. Continue focusing on the job and vocational training skills (indiscernible). Okay. What's your first

step?

INMATE SLATER: Make a list of all persons we had harmed, and became willing to make amends to them all.

DEPUTY COMMISSIONER ESTRADA: Okay. Very good. Very good. Mr. Slater, is there anything I may have missed?

INMATE SLATER: I think you covered it, Mr. Estrada.

DEPUTY COMMISSIONER ESTRADA: Okay. Counsel?

MS. TARDIFF: I believe it's been covered as well.

DEPUTY COMMISSIONER ESTRADA: Then I'll return it to the chair.

PRESIDING COMMISSIONER SAWYER: Tell me about your vocational eyewear. What's that program?

INMATE SLATER: Well, there's a -- it's associated with the American Board of Optitician[illegible]. We become certified through them. Actually, we were the first class of prisoners in the United States, thanks to our teacher, Mr. Bailey, to take the exam. So that was exciting.

PRESIDING COMMISSIONER SAWYER: So what's your title?

INMATE SLATER: Optician.

PRESIDING COMMISSIONER SAWYER: Optician. So you do have an optician's certificate license?

INMATE SLATER: Yes, but it's not current.

PRESIDING COMMISSIONER SAWYER: It's not current. What's it take to get it current?

INMATE SLATER: I would have to retake the exam, and have to pay the fee.

PRESIDING COMMISSIONER SAWYER: What's the fee?

INMATE SLATER: I don't know what it is now.

PRESIDING COMMISSIONER SAWYER: What was it before?

INMATE SLATER: It was -- the fee was really for continuing education, so it's nominal for someone that's working. I think it's about $50.00 a year.

PRESIDING COMMISSIONER SAWYER: I see. So what does this allow you to do with -- let's say you take the test again, pay the fee -- what does it allow you to do in terms of opticianry?

INMATE SLATER: Well, let's say those eyeglasses weren't fitting you properly --

PRESIDING COMMISSIONER SAWYER: Uh-huh.

INMATE SLATER: I would be -- I know how

to adjust the temples or the nosepiece. I could -- I've worked in a lab where I've manufactured eyeglasses.

PRESIDING COMMISSIONER SAWYER: And where did you learn the skip?

INMATE SLATER: At Donovan. They had both vocational and a BIA.

PRESIDING COMMISSIONER SAWYER: And so when they (indiscernible), just throw them away and buy some new ones. So what does this -- what does this mean to you on the outside?

INMATE SLATER: It's not something that I plan on pursuing, because if my -- if I'm release while my father's alive, I would like to get into the family business.

PRESIDING COMMISSIONER SAWYER: Okay. Well, let's say that didn't work out. I'm looking -- I'm looking for options here.

INMATE SLATER: All right.

PRESIDING COMMISSIONER SAWYER: So I'm looking for -- okay so you go with the family business; however, if that doesn't work, then you've got plan B -- a marketable skill.

INMATE SLATER: Well, I -- of course I have the opticianry that I could depend on. I also

PRESIDING COMMISSIONER SAWYER: What kind

of money do they make?

INMATE SLATER: The money like in most industries -- and mine, of course, is in sales. And that strictly depends on the individual.

PRESIDING COMMISSIONER SAWYER: So could you go to Lenscrafters and get a job?

INMATE SLATER: After I got my certificate reinstated, yes. Yes, I could. As a matter of fact, one of the fellows that worked with us, who was in my same class, became a manager at Lenscrafters after he was paroled. So we were all excited about that.

PRESIDING COMMISSIONER SAWYER: So it is a marketable -- real marketable skill.

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: It's not like upholstery.

MS. TARDIFF: You just go across the border.

PRESIDING COMMISSIONER SAWYER: I'm not trying to put upholstery down, I'm just saying that this seems to me to be a certainly much more specialized, almost white collar job, versus --

INMATE SLATER: Roofing, for example.

PRESIDING COMMISSIONER SAWYER: Right.

INMATE SLATER: I'm getting too old to

probably climb up there and start as a roofer.

PRESIDING COMMISSIONER SAWYER: That's dangerous, hard, hard work, especially around a place like this -- putting hot tar and rocks on the flat roof in August. You don't need to heat it up, do you? You just throw it up there in chunks and move it around -- let it cook. You also have plumbing, carpentry, as well as the roofing.

DEPUTY COMMISSIONER ESTRADA: We haven't verified the roofing.

PRESIDING COMMISSIONER SAWYER: You haven't verified carpentry and roofing?

INMATE SLATER: Huh-huh.

PRESIDING COMMISSIONER SAWYER: Okay. But you do have some skills in those areas?

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: Okay. Okay. That's all I have. Do you have any questions?

DEPUTY DISTRICT ATTORNEY DELAGARZA: The first question I have of the inmate is why is it that took two warnings and a CDC 115 before he stopped tenting since he knew what the rules were?

INMATE SLATER: It shouldn't have taken so long. My head shouldn't have been so thick.

DEPUTY DISTRICT ATTORNEY DELAGARZA: The question was why did it take so long? Why did you evade rules [indiscernible]?

INMATE SLATER: The second warning, after you look at the dates, with all respect, you'll see the day before that I received the 115. I had absolutely no knowledge of that warning until after the 115. As for the first warning, I didn't even -- I did not know there was a 128 in my file.

MS. TARDIFF: Most of the time, they get 128s, and the inmates don't know about it, because they don't receive them.

DEPUTY DISTRICT ATTORNEY DELAGARZA: So the inmate is saying that he is going to continue to violate the rules until he received a 115 and was made aware that he was violating?

INMATE SLATER: In the question of hygiene, ma'am, it is not obvious that you're in violation of the rules. It has more to do with the interpretation of the rules by an individual officer. When we wash our clothes or our sheets or whatever, we have to dry them. Some officers do not want you to put a laundry line up, period. Others will permit it to be hanging if it only takes up so much space. So the officer in question, Ms. Bush, that may have been her

pet peeve. Many, many people received write-ups from her for that particular thing. I'm not making an excuse for it, but I would like to put it in the perspective of being -- handing something on a laundry line in front of my bunk. That's what we're talking about here. It -- obviously after the 115, that misbehavior stopped. And I wish I had never done it in the first place.

DEPUTY DISTRICT ATTORNEY DELAGARZA: In reviewing the file, I was trying to determine when the inmate started AA and NA. And the earliest date I had was 1990. Is that when he first began either going to AA or NA, or was it at some prior time?

PRESIDING COMMISSIONER SAWYER: Do you know when you started AA?

INMATE SLATER: Not exactly. That might be correct.

DEPUTY DISTRICT ATTORNEY DELAGARZA: And initially it was sporadic, sometimes attending AA, sometimes NA, and sometimes neither. Is that correct?

INMATE SLATER: We had both programs running at the same time. Sometimes we'd go to one meeting. Sometimes just as you said.

DEPUTY DISTRICT ATTORNEY DELAGARZA: In

1997, the inmate told the counselor that he had perjured himself at trial, and had also lied when he went before the Initial Board Panel, and he blames his attorney for the perjury. Is it still the inmate's position that it was the attorney's fault that he committed perjury?

INMATE SLATER: Was it my attorney's fault that I committed perjury? No. It was my fault that I committed perjury.

DEPUTY DISTRICT ATTORNEY DELAGARZA: The reports indicate that the inmate was arrested approximately a month later when he was a Howard Johnson's, and he'd gone there to sell drugs. Is that, in fact, true?

INMATE SLATER: That's true.

DEPUTY DISTRICT ATTORNEY DELAGARZA: I believe that's all the questions I have.

PRESIDING COMMISSIONER SAWYER: Okay. Thank you. Counsel?

MS. TARDIFF: In your first five years of custody, was AA available to you, or were you in an institution where your classification status precluded you from participating in self-help? Do you remember?

INMATE SLATER: Self-help, I believe, was available. I did not seek it out at that time.

MS. TARDIFF: Okay. So it was about five

years after you initially incarcerated that you began to do self-help?

INMATE SLATER: I started meeting more people that were going to meetings, and they got me interested.

MS. TARDIFF: I don't have anything further.

PRESIDING COMMISSIONER SAWYER: To the close?

DEPUTY DISTRICT ATTORNEY DELAGARZA: Yes, please. The District Attorney's Office of Los Angeles County proposes denying a parole date for the inmate. Beginning with the inmate's criminal history, he was heavily involved with drugs during that time period and he had an escalating pattern of criminality with respect to his drug usage, and also his involvement with the illegal sale of drugs, to the point that during the time period of this crime, the inmate was carrying a weapon in order to, I guess, protect himself in the carrying out of his trade of selling drugs. With respect to the crime, it was a very callous killing of an individual for no reason other than the inmate was impatient about the fact that he was attempting to sell drugs and the victim interfered by getting involved in an argument with Mr. Lincoln, who

was the inmate's client at that particular point. After having committed this very callous killing, the inmate did little to help the victim. He basically said, oh, I'm sorry, but you need to do it, told him to call for help, and then he took off. And he showed absolutely no remorse, because we have him a month later still involved in the selling of drugs, and when he was arrested, he was still carrying a weapon, albeit a knife at that particular point. But again, having killed an individual because of his usage of drugs, did not deter him from continuing in this particular lifestyle. He perjured himself at trial and testified that he thought the gun was not loaded, and it was not until 1997, and so even at the first BPH Hearing, he arrived at that particular hearing -- (Tape Ends)

(Off The Record)

PRESIDING COMMISSIONER SAWYER: Okay. We're continuing to record on Side 2.

DEPUTY DISTRICT ATTORNEY DELAGARZA: The inmate, who has two 128s and one 115, all for the same thing, tanting and what draws my attention to this is the fact that back then the inmate was impatient about what he wanted, when he wanted it. And again, since he's been

in prison, it was his need for privacy, and it wasn't until he finally got a 115 that he stopped. His version today that he was doing laundry I submit is ludicrous. According to him, basically he would have been doing laundry on two days, because he said he got a 128 right before the 115, and it was one day before. So he's saying to this panel that I guess he was involved in doing his laundry on two separate days. And I just don't believe that that is probably true. What is probably true is that he was, in fact, trying to establish some privacy for himself, despite the fact that it's against the rules. And with respect to the crime -- of the severity of the crime, the fact that he perjured himself, the fact that he lied to the panel initially, and it's only been since 1997 that he is accepting full responsibility, although even in the 1997 report, he blamed his attorney for the perjury, and also, I guess, feeling that it would be a better story for -- telling that story to the panel at his first Board. He has come a long way with respect to his involvement in NA and AA. And with respect to his educational and vocational training, I see problems with respect to the fact that he's got all his eggs in one basket, and that's the

fact that he plans to have his father basically support him because, you know, what he's going to be doing, but he knows that daddy's going to be able to pay him and doesn't seem to have much other knowledge with respect to his vocation. Based on all those factors, the District Attorney's Office of Los Angeles County feels that he is still unsuitable for parole. Thank you.

PRESIDING COMMISSIONER SAWYER: Ms. Tardiff?

MS. TARDIFF: Thank you. In terms of the District Attorney's remark (indiscernible) prior criminal history, there is prior criminal history, non-violent in nature. And I would also like to point out in the probation officer's report on page 14 states that's a mitigating factor, relatively insignificant criminal history. So even at that time, it was considered an extremely damaging element. The criminal offense itself -- he has accepted responsibility, and it is what it is. The fact he perjured himself, he has fully admitted that. I don't know what more he's expected to do than to admit that he perjured himself and go forward from there. You know, it's kind of you're damned if you do, damned if you don't. Either

you come clean, it's not right. If you don't come clean, it's not right. So I think Mr. Slater obviously took the best route and he came clean. And that's what he did. And I don't think that should be something that should be used against him at today's Hearing. And he, in fact, has laid all the cards out on the table, so to speak. It's not unusual for -- in fact, I think probably the majority of the inmates we see initially and throughout their trial, try to mitigate their responsibility. I'm not saying it's right, but it's just kind of human nature actually. In terms of the use of the two 128s and the one 115, I think that the District Attorney was really trying to stretch some sort of negativity out on Mr. Slater's programming. It's ridiculous, first of all, to use 128s that are not supposed to be used against an inmate. They are counseling chronos. They are not disciplinaries. And the cases clearly show -- the court cases -- that serious 115s are the ones that can be used an inmate at a parole hearing. His 115 is not serious -- not even close to being serious in nature. It's an administrative 115, and I submit that it's ridiculous to -- if that's all that can be found about Mr. Slater's programming, then he's really

done a great job. In terms of his programming, I know we've all seen what he's done. He's done a great job. He's really done a lot of self-help. He's done a lot of anger management courses. He's been the facilitator for Hands of Peace. He's been the chair of NA/AA. Currently, I believe, he's the chair.

INMATE SLATER: No.

MS. TARDIFF: No? Okay. When was the last time you were a chair? A couple of years ago he was a chair. He's had participation in NA or AA for 15 years now. I don't think that -- I think that's a positive factor rather than the District Attorney using that as a negative factor. He's also participated in morality and values, conflict resolution, stress management, and further, he participates in spiritual growth through the church for 15 years. In terms of what he -- I mean, what we have here is an individual who works full-time, goes to college full-time, and in whatever spare time he could have, which I don't know how he could have any, he tutors and participates in self-help. His programming cannot be faulted. He has what we know of for sure is two verifiable vocations, and the roofing and carpentry, as well, which I know is not verified; but two for sure, four

probably. He's always worked since he's been incarcerated, numerous job positions, and it's been steady. In terms of getting back to the disciplinaries, and this goes to the root of one of his major problems is obviously drug abuse. He doesn't have any 115s for substance abuse, or alcohol or drugs. I think that's more important to be focused on rather than the tenting incident. No violence, no substance abuse. That's to me the bottom line. He's coordinator of the literacy program at this point. His psych evals are supportive of release -- the last two, and while that's been read into the record. Under the plans if granted release, financial vocational plan is rated as a three, stating that his work plans are active, practical, well-planned, and consistent with his training, and he is motivated. His level of support is a three. Prior work history, of course, is two, prior to incarceration. But in terms of what he's done since he's been incarcerated, I would submit it's a four. His institutional adjustment is rated as excellent. It states that the number of times of 115s suggests a good institutional adjustment, no 115s at all for violence or drug or alcohol abuse, highly motivated. His participation in

AA and NA have been outstanding. Overall, this inmate's discharge plan is rated at one excellent, two good, and one fair. He has a high GAP score of 90 out of 100. Under the comments -- well, under the assessment of dangerousness, the high risk factors involve nothing to do with what he's done since he's been incarcerated. It doesn't say he's got a lot of disciplinaries, of has been violent while he's been incarcerated. It all has to do with his pre-conviction history, including the drug abuse. But since then, 20 years, he has nothing to indicate that he remains a high risk. It states he has a good awareness of the circumstances that resulted in his committing this serious offense, and that circumstantial situational factors appear to play a significant role in his offense. He does not minimize or rationalize his role, and he acknowledges the wrongfulness of his actions. I think what's more important, too, is that while there's a diagnosis of adult antisocial behavior -- and I know I'm not a psychologist, but I do a lot of mental health issues, and I believe that an adult antisocial behavior is not a mental disorder. That falls under Axis II, and it's a personality disorder, and it's not considered a

mental disorder. That's my understanding, and I've read hundreds of psych evals. And behavior does not amount to a disorder as well. It should say adult antisocial disorder. It says behavior, so I don't get it. In either event, it says is the inmate in need of treatment for any of the above diagnosed problems. And the answer is no. The psychological understanding of his involvement in the commitment offense -- he appeared brutally honest, and that was read into the record already. But it concluded he had good insight into his deviant behavior. And then lastly, it evaluates that circumstantial, situational elements was the primary factor of the commitment offense. The evaluation in 2000 was also supportive of release. It stated that his insight and judgment are excellent, and that he has a high GAP score of 90. Inmate is able to display a good level of insight. He is able to express empathy and remorse for the victim. Under assessment of dangerousness within the community, no greater than that of the average citizen. And of course, significant risk factors is to fall back into drug dealing and using drugs, obviously. Under the comments and recommendations, this is again the 2000 evaluation, it appears that the inmate's self-

centered thinking has changed. He is able to consider the rights of others before his own, able to take responsibility for his actions, and appears to be committed to remain abstinate from drugs and to maintain gainful employment. And the '97 evaluation also addresses the substance issue. It states that he says that at a deeper level, his substance abuse problem started with his attitude about life and how he handled pain, fear and anger. It appears he is making a strong effort at self-understanding and self-improvement, and there are no signs or symptoms of a traditional mental illness. Currently no mental health recommendations. And that's going back to '97. I think he's really done a great job. I don't know how he does all of this on a weekly basis. It's hard to be a full-time student, let alone working full-time. But he certainly manages to do all that. He also helps others on a volunteer basis. Done the vocations. His disciplinaries are minor, administrative -- only one. His parole plans are viable. In the event that -- the comments made by the District Attorney in terms of his parole plans -- if for some reason the parole plans he has regarding his father's business don't come to fruition, he has marketable

skills, and that's what the parole requires -- to have marketable skills or a job offer. He has both at this point. I mean, anything can happen. You can have a hurricane, and the business is destroyed, and you can only plan as much as you can. He's fortunate that he has the opportunity to take over a business. It's tough when you don't have family out there to help you find jobs. Most of the inmates we get, they get jobs through family. I don't think he should be faulted for doing that. I don't think he would go out and do something like this again. I don't believe he poses an unreasonable risk of danger. There's no indication that he would. He has an understanding of the underlying causes of the commitment offense, and obviously that was the [indiscernible] which involved drugs and the selling of drugs. There's no indication in the last 20 years that he would participate in that. And more time I don't think would serve any purpose other than to continue to punish Mr. Slater. His evaluations are supportive of release, particularly the last five years, and probably back to 1997. With that, I'll submit. Thank you.

PRESIDING COMMISSIONER SAWYER: Thank you. Mr. Slater, this is your opportunity to

address the Board if you'd like to, and tell us why you feel you are suitable for parole.

INMATE SLATER: I believe I'm suitable for parole for the reasons that Ms. Tardiff has mentioned. All I can say to you, sir, is that if you find me suitable, and if I make it out to the streets if my suitability is confirmed, I'll be a good citizen, you know. I'll be someone that the community will welcome. And if I'm not found suitable -- and I realize I may not be found suitable for the rest of my life -- I may die in this prison -- I will continue, for my own reasons, to run a good program, and to make the most of my life, whether it's here or on the streets. Because these forces are much bigger than I am. And I know I'm not the first person or will be the last, unfortunately, to be in this position. I -- I hope that you can see who I really am today, because if you do, you'll understand that I do not pose an unreasonable risk or threat to society. Quite the opposite, sir. I was a very foolish young man, and I'm paying for that, my family's paying for that. Gary has paid for that, and Gary's family is paying for that. And that's all I have to say to you, sir.

PRESIDING COMMISSIONER SAWYER: Okay.

Thank you. The time is 5:44, and we will recess with deliberations.

R E C E S S

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CALIFORNIA BOARD OF PAROLE HEARINGS

D E C I S I O N

DEPUTY COMMISSIONER ESTRADA: Okay. We're back on record.

PRESIDING COMMISSIONER SAWYER: The panel has reviewed the information received from the public and relied on the following circumstances in concluding that the prisoner is not suitable for parole and would pose an unreasonable risk of danger to society and a threat to public safety if released from prison. We wrestled with this. We -- we did wrestle with this, because of what I'm going to be saying here, and the nice stuff that I'm going to be saying in a few minutes. But we're real -- we're still hung up on the way this cruel and callous, dispassionate, calculated manner of this. We're not sure if you tried to execute, or if you executed this guy or not. Now we're not going to debate it. Okay. You seemed a lot smarter, and of course, you were under the -- you were spending a lot of time, and your brain was burning pretty good back in those days 20 years ago. But you seem -- given your history, given your upbringing, to not be able to count the number of bullets in a weapon, and not understand a revolver and how it works, that it turns every time you pull the trigger it turns first. So if you put -- if you set the

bullet on the right or the left side, depending on if it's a Smith & Wesson, it goes one way -- if it's a Colt, it goes the other way, and -- and puts the cartridge in the barrel, in the center. So it's -- it's somewhat baffling to us. And again -- and I'm not -- and you'll never hear me blame drugs or alcohol on -- on causing crime, because they don't cause anything. It's the person who indests. But you just seem like a smarter guy than that, to let something like that go. If you didn't perhaps intend that to happen. Now one is second degree, so we're not retrying this case. It's just incredibly stupid. Let's write it off to stupid at this point. It was -- to put a gun to anybody's head, even empty, is not the brightest thing to do in the world. You were living in a different world, I think, at that point in your life. And -- and the -- it's just an exceptionally stupid thing to do. I mean, Mr. Solce wasn't even armed. You know, he didn't have a chance. He was the victim of a cruel joke, if that's the way we want to characterize this. But it was quite the offense in which everyone lost. He lost the most. You do have -- in your previous record that we always talk about and we look into. I guess we can see that we did see an escalating pattern of criminal conduct. You were involved with criminal behavior, stealing from the

JCLA lab, being a drug dealer, not paying your bill at hotel, unstable, tumultuous, married for two years, just bouncing off the walls, from the sound of it, you did some time at the County Jail. You had a variety of drug violations in your -- in your prior history with the LA's Sheriff's Office, LAPD, Placerville Sheriff, and this is drug, drug, drug, drug, drug, and up to the commitment offense. You can't believe how many -- you know, as we sit and do hearing all day long, you can almost predict. You want to scream at people and say you're not going in the right direction here. It's getting worse and worse, and it's having an effect on all aspects of your life, your relationships and everything. Your institutional behavior -- I'm not going to get too excited about the tenting issue here. We're not going to get too excited. I asked my partner if he had to dry his laundry in his cell, he would be accused of putting up a huge tent. And he'd get a 128 in a minute. And so you should be commended on one or two chronos in 20 years. There's no question about that. It seemed like you might have been a little hard headed, which is what I don't like to see. And when it came to -- when you talked about Mrs. Bush, who you obviously weren't getting along with, she was -- you're not going to be able to blame her for this.

You're going to have to take the responsibility yourself. But it -- you know how the program works. You've been here long enough. You're a senior citizen here as far as that's concerned. Not that I meant in the normal sense of 50. You're just half way through, especially with your family's longevity. So you're doing -- you're doing fine there. And you don't look 50, either. So apparently the drugs didn't have a long-lasting effect on you. Particularly -- we're particularly impressed with the two that we know that you have certifications for -- the optician -- that's really solid -- plumbing certificate, carpentry. We would like you to get your carpentry certificate and your roofing certificate -- those completions. Get them into your C File. You're to be commended for your being a tutor and general studies. You've been in Breaking Barriers, Life Plan for Recovery, Alternatives to Violence, Hands of Peace, Self-Confrontation, Anger Management. You've taken class work in management, accounting, health, business and math. You've got another course called Management through Mediation, Friends Outside, volunteered in the literacy program. And these tutoring and volunteering programs are generally as good for you as they are for the individual.

INMATE SLATER: Thanks.

PRESIDING COMMISSIONER SAWYER: They're a therapy to you. So we'd like to see you keep doing that. I'd like to see you keep doing AA and NA. There are programs you can get in there, because that's gonna be your lifeline to the outside when you do get your parole date.

INMATE SLATER: Okay.

PRESIDING COMMISSIONER SAWYER: There's no doubt in my mind that you'll get a parole date. And you're doing very well when it comes to this. The psychiatric report was positive, all the way back to the year after he was born.

MS TARDIFF: Since before.

PRESIDING COMMISSIONER SAWYER: How many did you read? Three of them?

MS. TARDIFF: (laughing) Yes.

PRESIDING COMMISSIONER SAWYER: Okay. Your dad, Ernest, sent a nice letter. Your mom sent a nice letter. He's got, as he says, a beautiful condo on the west side, West LA. And he s offered you not only a place to live, and he s looking for cons and wants to turn the business -- from the looks of it, wants to turn the business over to you. And that's Slater s Commercial Rentals. And where are his rentals? Mostly in west LA?

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: There was opposition, however, from Los Angeles County District Attorney's Office represented by Mrs. Delagarza. And she drug a few things out that needed to be drug out, I believe, and put on the record. It should also be noted that you were in the military as a pharmacist specialist and did get an honorable discharge.

INMATE SLATER: Yes, sir.

PRESIDING COMMISSIONER SAWYER: Did we ever find that in the C File? We'd like to see that in the C File if you can find it or get it. We're going to deny you for one year. No more 115s, 128s. Continue your self-help. Stay discipline free. Earn the positive chronos. And I want to note for the record that LAPD did send a letter, but it's for Craig Michael Slater. Have you ever been mixed up with anybody else?

INMATE SLATER: No.

PRESIDING COMMISSIONER SAWYER: Okay. But he does have your CDC number. But it's a whole different crime. You were robbing a gas station on that one. And for the record, this is a mistake, because there was no robbery at a gas station by this -- by this inmate. I had to

get that on the record. Okay. Mr. Estrada?

DEPUTY COMMISSIONER ESTRADA: Mr. Slater. Okay. Let's start getting serious now, okay? You need to start bringing in documentation. If you do have a certificate for roofing, for carpentry, your high school diploma, your DD214. I mean, just start getting serious about, like how it says, you're getting close to 50 years old. You've been here for quite a few years. Get down to the nitty gritty and start getting those documents. They will help you, okay?

INMATE SLATER: Yes.

PRESIDING COMMISSIONER SAWYER: It can't hurt you by having Plan Bs, either. Plan B to go stay with someone else, at least initially. I know your dad's plan is solid. You know, I can have a good feeling about that. There's no question about that. It makes you not want to look for anything else. But if we do have Katrina come through West LA and destroy your commercial property, you don't want it anymore. You don't want to be there. You know, you never know. I mean, quite frankly, LA's earthquake city. So I'm sure he'd diversified enough to not worry about that. But if you want to impress the Board -- and I'm not saying to

impress the Board, because we're very much realists -- and the real issue is you've got a marketable skill here. Let's see what you might be able to do as a backup plan in case your dad gets mad at you and throws you out of the house -- out of the condo -- beautiful condo he's got. And then you need a job at Lenscrafters or something else. I'm not saying to get it renewed and take the test, unless you can

INMATE SLATER: I believe that's possible.

PRESIDING COMMISSIONER SAWYER: Okay. But you've got that skill, and that's a real -- that a good, almost a white collar skill. And there's lots of companies that -- so just get the West LA phonebook or whatever, and find out how many places hire people with this kind of skill in the West Los Angeles area where you can jump on a bus and get to it, because gas is three bucks a gallon now.

INMATE SLATER: That's what I've heard.

PRESIDING COMMISSIONER SAWYER: Yeah. So is a loaf of bread. So it's -- it's expensive to live out there. And I know, again, you think you've got that covered, and you probably do. But -- but the next panel is going to hear you.

and they're going to say, man, this guy is hard to turn down. Also, if -- if you could get us a little more idea of what, you know, how many commercial buildings. We don't want to look at the numbers. We don't want to see a business plan of your father's, but you might have a modified business plan so that we have confidence that you going into there, you're going to go in and hit the ground running. Okay. What I'm going to do in the next five years with my dad's commercial property. You know, there's things to do. Talk about all the issues. You've got maintenance issues. You've got bill collecting, you've got debts, you've got all kinds of things that are stressful, unless you've given them some thought. Okay?

INMATE SLATER: All right.

PRESIDING COMMISSIONER SAWYER: All right. Good luck to you.

INMATE SLATER: Thanks. I appreciate it.

PRESIDING COMMISSIONER SAWYER: We've got a lot of confidence in you.

INMATE SLATER: Okay. I appreciate that. Thank you for your advice.

--oOo--

PAROLE DENIED ONE YEAR.

THIS DECISION WILL BE FINAL ON: _____

YOU WILL BE PROMPTLY NOTIFIED, IF PRIOR TO THAT DATE, THE DECISION IS MODIFIED.

MICHAEL SLATER D-39052 DECISION PAGE 10 10/27/05

CERTIFICATE AND
DECLARATION OF TRANSCRIBER

I, ELIZABETH SCOTT, a duly designated transcriber, PETERS SHORTHAND REPORTING, do hereby declare and certify under penalty of perjury that I have transcribed tape(s) which total one in number and cover a total of pages numbered 1 - 60, and which recording was duly recorded at CHUCKAWALLA VALLEY STATE PRISON, BLYTHE, CALIFORNIA, in the matter of the SUBSEQUENT PAROLE CONSIDERATION HEARING OF MICHAEL SLATER, CDC NO. D-39052, ON OCTOBER 27, 2005, and that the foregoing pages constitute a true, complete, and accurate transcription of the aforementioned tapes to the best of my ability.

I hereby certify that I am a disinterested party in the above-mentioned matter and have no interest in the outcome of the hearing.

Dated NOVEMBER 20, 2005, at Folsom, California.

Elizabeth A Scott

ELIZABETH SCOTT
TRANSCRIBER
PETERS SHORTHAND REPORTING

CHUCKAWALLA VALLEY
STATE PRISON
BLYTHE, CALIFORNIA
PSYCHIATRIC EVALUATION FOR THE BOARD OF PRISON TERMS
(revised 1998)

INMATE:	SLATER, MICHAEL
CDC#:	D39052
DOB:	1/02/55
DATE EVAL:	02/11/05

Copy to inmate via CCI 2-22-05 VH CSH

PSYCHOSOCIAL ASSESSMENT

I. Identifying Information

The inmate was informed of the nature of this evaluation, and that prior to writing, this evaluation his C-file and medical records would be reviewed. He stated that he understood and would cooperate. The inmate was seen for approximately two hours. This is the sixth BPT evaluation for this 50-year old Caucasian male. He was convicted in Los Angels County in 1986, receiving a 15-year to life sentence for second degree murder plus a two-year enhancement for a weapon. The inmate does not have a juvenile criminal record. His records indicate he does have prior misdemeanor convictions, trespassing and possession of narcotics. There is no record of prior adult felony convictions. There is a record of two 128A's from 2/00 to 9/00, and he has received one 115 10/01/00 tenting and curtain CVSP.

II. Development History

The inmate was raised by both parents. His parents separated when he was approximately 11 years old. His mother remarried a couple of years after that and he lived with his mother and stepfather who he stated was a nice man. His father also had a good relationship with the inmate, he picked him up on weekends and he stated that he had good family relationships with both sets of parents, because his father remarried later too, but he was out of the household by then. He did not indicate any history of behavioral or emotional problems and provided no history of either physical or sexual abuse.

III. Education

The inmate finished high school he graduated from Hamilton High School receiving a C average. There was a history of delinquency and truancy. He also when he was in CDC attended Palo Verde College in 2003 to present, he has completed four semesters in Liberal Arts. While in CDC he has completed the following educational courses and programs: alterpative to violence, life plan for recovery, morality and values, breaking barriers, awareness meditation program, hands of peace, creative conflict resolution, introduction to stress and relaxation, management through meditation, friends outside, parenting, and anger.

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I/M Slater, M /D39052

management. He completed four vocations: vocational roofing, vocational plumbing, vocational eyewear, and vocational carpentry. He was a tutor in general studies from 2001 to present, volunteered for breakfast for Santa, Toy for Tots, and took first place in volleyball in 2002.

IV. Family History
The inmate was born 1/02/55 in Los Angeles. His father's name was Ernest, mother's name Marlene, and two stepfathers Ronnie and Sidney. He was raised by his parents from birth until 11 years old, and then by his mother and stepfather. His parents divorced in 1966 when he was 11 years old. Both parents are still alive, but remarried. He describes continuing phone calls, letters, and visits from his mother, father, sister, grandmother, cousins, and friends. Over the past five years he has had about 12 visits from all of the above except his grandmother.

V. Psychosocial Developmental and Sexual Orientation
The inmate has described himself as exclusively heterosexual and unconflicted regarding his sexual orientation. He did not provide any genetic, medical, social, or developmental history suggestive of a disturbance in gender identity. The record does not indicate and he did not volunteer any information that would suggest aggressive high risk sexual conduct or deviant sexual behavior.

VI Marital History
The inmate has been married one time in 1983 and divorced in 1985, and there have been no children.

VII. Military History
The inmate stated that he served in the army from 1972 to 1975 job title was pharmacy specialist. He had been stationed at Fort Mead Maryland, he has obtained a rank of E4 and received an honorable discharge.

VIII. Employment/Income History
The inmate's longest primary employment was from 1970 to 1972 and then from 1975 to 1979 working for his father who manufacture installed and bars for windows. He helped install manufacture and was involved with sales. His employment also included selling shoes at Standard Brands in 1980, he was a part time tutor for an agency in the late 70's tutoring math and part time working at Spice King from 1960 to 1970 which made and packaged spices various formulary, and he was an electricians helper from 1982 to 1983. Within CDC9he has worked in the following positions: sign shop at Folsom in 1988, PIA optic at Donovan 1991 to 1996, program clerk 1992 to 1993, landscape at Donovan 1997

I/M Slater, M /D39052

to 1998. He was also working in landscaping maintaining softball diamonds and volleyball courts in 2003 at CVSP, and then working at the horseshoe pits at CVSP in 2004 to present, currently he is working in the horseshoe pits in D yard.

IX Substance Abuse History
The inmate has provided history of drug related convictions. He also has provided a pattern of alcohol abuse beginning at age 16 drinking just socially and as he became older and was in the army drinking more frequently when he was about 19 years old. Cocaine started in 1978 and "whenever I could get it" he consumed it. Methamphetamine in 1980 depending on his finances for the next five years and became a drug addict methamphetamine. Depending on finances was related to cocaine not methamphetamines. He also was selling drugs for the last five years. He claims that he has not used any drugs or alcohol since 1986. There is no record of drug or alcohol abuse since entering prison. He has never participated in a drug or alcohol treatment program since entering prison. He has never participated in a drug or alcohol treatment program prior to his arrest. Within CDC the inmate has participated in AA and NA. From 1990 he alternated between AA and NA all the way to the present. Chairman of AA from 2001 to 2002.

X Psychiatric and Medical History
The inmate has described himself as good. Provided no history of serious illnesses, no diseases, but he did say that he had hepatitis C, no injuries, accidents or other serious health problems. No history of hospitalizations, surgery, or long-term use of medications. He did not report a history of serious head injury. Did not indicate a history of seizures. The only health problem was hepatitis C. He did report one mental health treatment on 9/06/00 here at CVSP. He has never attempted suicide, never has been on psychotropic medications including hospitalizations and never has received SSI/SSD/SSA for health or mental health related causes.

XI Plans If Granted Release
Rating scale: 1-limited, 2-fair, 3-good, 4-excellent. Please note that this evaluation is based exclusively on information presented by the inmate.

Financial/Vocational Plans. Rated at 3 good. There is a letter in C file. He plans on working for his at Slater Rentals Commercial Property and what he plans on doing is repairing the property and also doing bookkeeping. His work plans are active, practical, well planed, and consistent with his training, and he is motivated.

I/M Slater, M/D39052

Level of Support: Rated at 3 good. There is a letter in his C file. He plans on living with his father, Mr. Slater, at 850 North Kings Road, West Hollywood, California, (323) 653-0706. Level of support offered by his family appears to be very good. He has had moderate visits while in prison, but frequent contact by letters and phone. The inmate has good community support when he paroles from his mother, father, sister, cousin, friends, and grandmother.

Prior Work History: Rated at 2 fair. Prior to entering prison the inmate has demonstrated limited work history. Within the CDC over the past 20 years he has improved his reading, writing, and math skills. Certificated programs were mentioned previously. He has worked in the following positions.

Institutional Adjustment: Rated at 4 excellent. It appears that this inmate has made a positive adaptation to prison. The number and type of 115's suggest a good institutional adjustment. No 115's since 2000, and no 115's at all of any violence or drug and alcohol use. The job and training and work he has accomplished, reflects a high level of motivation. His participation in AA and NA has been outstanding. Attempts at continuing his education has been consistent. The inmate states that he is active in his faith spiritually on a regular basis for the past 15 years. Overall this inmate's discharge plan is rated at one excellent rating, two good ratings, and one fair rating.

Clinical Assessment

XII. Mental Status Exam/Treatment Needs

Physical characteristics: there are no tattoos. He has related to this interview in a cooperative manner. He sat upright and maintained good eye contact. He was oriented times three. Speech was clear and coherent. Affect was appropriate to thought content. Intellectual functioning appeared in the average range. There was no evidence of a perceptual disorder. He denied any history of hallucinations or delusions. There was no evidence of a formal thought disorder or associational disturbance. He stated that he was without suicidal ideation.

DIAGNOSIS

Axis I identifies the immediate presence of an acute psychiatric or substance abuse disorder, including serious mental disorders as defined in the CDC Mental Health Services Delivery Systems (MHSDS). Axis II identifies personality and/or developmental disorders which are generally chronic, pervasive, and less amenable to treatment.

I/M: Slater, M./D39052

I History of adult antisocial behavior, and history of polysubstance abuse/dependence
II Diagnosis deferred
III Physical disorders or conditions: hepatitis C
IV Psychosocial stressors: stressors of incarceration
V Current GAF is 90

Psychotropic medications: none
Alerts: none

XIII. Review of Life Crime (as told by the inmate)
The inmate agrees to the review of the life crime by Dr. Payne dated 4/12/00 to the Board of Prison Terms

Feelings The most horrible thing ever! At that time for whatever reason I did not want to be straight, I guess I had given up on living a natural or a normal life. My values were very corruptive, for an example like being a citizen, or making a contribution to society, or having my parents proud of me. I thought I would use speed for the rest of my life! Killing the victim was a total accident. It was stupid. I was pissed off, I had a taxi waiting, and then got involved in an argument, and I thought I would teach him a listen. I tried to scare him. In my mind at that time it was completely a safe act. No question about it that it was going to fire, but being loaded and up for days on end, I had no idea where the bullet was. Because of my impatience and arrogance my being mean at the moment, I ended up executing the wrong judgment, the result was I shot and killed the victim (I knew him from the past). I contacted Gary's mom (the victim) years later through an investigator, she turned out to be a very nice lady. I wanted to contact her "she deserved to hear from me to help her heal", and myself also to know that I thought of the victim fondly, and it was an accident, he had been on my mind ever since. Maybe this will bring some closure to her. She stated that at the time that she was trying to forgive me. I carried a gun often during my five years of selling drugs I thought this would protect me. This was a life style for me. I tried to eat and sleep, but not everyday. I experienced total hallucinations off and on. Back then I felt I had been in a "niche" that I like selling drugs and doing well, working only surface deep no spirituality of connection to it at all. Before my drug days off and on spiritually I was feeling empty and God had abandoned me. While I was taking coke I could not stop! Until meth (methamphetamines) I did not want to be straight, because I did not want to deal with life. When I got over the cocaine, I got over my guilt. Today I don't need someone else to be okay. I don't need someone else to love myself.

I/M: Slater, M./D39052

I can see myself through my own eyes now. Life and failure and success do not fear from me I try to stay engaged in the process. I enjoy the company of other people. I appreciate my family. I want to take care of my family. Before I only thought of myself and I didn't like myself very much! There was a big expectation of me from my family and for myself to go to medical school and that wasn't going to happen, and I didn't think there would be a second choice.

XIV. Assessment of Dangerousness

Below is a comparative list of low and high risk factors and the frequency for each category to be used in evaluating the inmate for relapse and reoffense.

Low risk factors: No prior felony convictions. No record of aggression or violence in prison. He has maintained a long-term presence in AA and NA. Overall adaptation to prison life has been positive and constructive. The offense did not appear to be premeditated. This inmate acknowledges he committed the offense. He fully acknowledges the wrongfulness of his actions. The inmate appears to take full responsibility for the offense and does not appear to rationalize or minimize his role. He appeared to fully express remorse for his actions. When asked he shared extensive expressions of guilt or remorse. This inmate appeared to feel guilt for his actions and can empathize at an emotional level of the harm done to the victim and the victim's family. This inmate demonstrated good awareness of the circumstances that resulted in his committing this serious offense. This inmate appears to be highly motivated to undertake constructive changes in his life. Circumstantial/situational factors appeared to play a significant role in his offense.

High risk factors: Prior adult criminal record, prior misdemeanor convictions, and history of drugs/alcohol abuse. Drugs/alcohol played a significant role in his offense. The offense was committed during the commission of another crime. The inmate was an active participant in the offense. Prior to committing the offense the inmate was in a possession of a lethal weapon. There was no immediate threat to the inmate. The offense was lethal and resulted in the death of the victim. The victim was highly vulnerable.

XV. Clinician Observation/Comments/Recommendations

Does the inmate have a diagnosed major mental disorder?=Yes, history of adult antisocial behavior.

Does the inmate have a diagnosed personality disorder?=No

I/M: Slater, M/D39052

Does the inmate have a diagnosed substance abuse problem? Yes, history of polysubstance abuse/dependence

Is the inmate in need of treatment for any of the above diagnosed problems? No

What actions has this inmate taken to address treatment needs? Long term participation in AA and NA and self help groups

Currently how amenable is this inmate to treatment? He is amenable

Is there a psychological understanding of this inmate's involvement in the committing offense? Mr. Slater appeared brutally honest in his reflection of his life style as a drug addict and a drug dealer. The self centered and destructive behavior corrupted his body as well as his mind. This inmate had experienced periods of paranoia audio hallucinations and addiction that he thought that he would be able to live with for the rest of his life. He had good insight into his deviant behavior and the emotionality that went with it.

Today this inmate has been able to achieve a drug free existence, and has excelled occasionally, academically, and disciplinary free during his 20 years of incarceration.

Within a controlled setting it appears that this inmates propensity for violence is less than that of the average inmate providing he remains substance free and participates in AA/NA meetings with a sponsor and periodic drug testing, and within the community it would be also less than that of the average citizen. He has also gained knowledge and insight in to the dangers of drugs and guns, and in a less controlled setting such as a return to the community this inmate can be considered to hold present gains.

Considering three primary elements to an offense:

1. Internal psychological dynamics of the defendant/inmate
2. Circumstantial/situational elements of the offense
3. Criminal mindedness and intent of the defendant/inmate

This evaluator would rank order these three elements with regard to their contributing to this inmate's offense as follows:

1. Circumstantial/situational elements of the offense
2. Criminal mindedness and intent of the defendant/inmate
3. Internal psychological dynamics of the defendant/inmate

I/M: Slater, M./D39052

This evaluator would recommend that when this inmate parolees he be required to participate in the following types of programs. participate in AA and NA meetings weekly with a sponsor and periodic drug testing. To continue focusing on his job and vocational training skills, and to continue to obtain his degree in school.

Bob Ohling, PH D
Clinical Psychologist

d 2/11/05
t 2/15/05
as

CHUCKAWALLA VALLEY
STATE PRISON
BLYTHE, CALIFORNIA

PSYCHIATRIC EVALUATION FOR THE BOARD OF PRISON TERMS
(revised 1998)

PATIENT: SLATER, MICHAEL
CDC#: D39052

DOB: 01/02/55

DATE: 04/12/00

Psychosocial Assessment

I. Identifying Information
This is the fifth report for the Board of Prison Terms on this 45-year old Caucasian male, serving a sentence of fifteen years to life plus 2 years for second degree murder with the use of a firearm. His last report was done in April of 1997 a diagnosis given of cocaine dependence and adult anti-social behavior, which is consistent with previous diagnosis. The inmate was originally arrested in August of 1995 at the age of thirty, and he went through a trial by jury and entered CDC in September of 1986 at CIM. He was incarcerated at Folsom from 12/86 to 3/89 and then was at RJD from 3/89 to 10/98 and has been here at CVSP since 10/98. Inmate is divorced and he describes himself as a Christian.

II. Developmental History
Inmate was born in Los Angeles Ca. and he has one sister who is younger by five years. Inmate required a C-section at birth, but he did not report any birth abnormalities. He learned to walk and talk at a normal age and reports that his parents divorced when he was ten years old. He says that he was not very disciplined in school and says that his mother seemed to have a nervous condition and had problems controlling her temper, which carried over onto the inmate who would act out at times in school in an aggressive manner. Inmate reports being cruel on occasion to cats and lizards and says that prior to the age of twelve he had an interest in playing with fire, and at one time set a shed on fire, which required the Fire Dept. being called. There is a history of undergoing a hernia repair around the age of two years old, as well as at the age of ten. There is no significant history of physical or sexual abuse. Inmate states that he began cutting school in the eleventh grade and eventually graduated in 1972 from Hamilton High in Los Angeles

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Slater, Michael
CDC #D39052

III. Education
Inmate went to Santa Monica Junior College for a period of two years and then transferred to UCLA for about three years where he initially majored in psychobiology and then switched to physics. He began using drugs, his grades went downhill and he was eventually asked to leave college at the age of twenty-six. Within CDC the inmate has obtained and completed vocational training for being an optician, as well as in plumbing. He has worked in PIA optical and he has also worked as a clerk. His last TABE test was in October of 98 which gave a grade level of 12.9. Since being here at CVSP the inmate was initially involved in business tech vocational training and then switched to plumbing which he completed a few weeks ago. He now has plans to take vocational roofing. In the past the inmate has been involved in AMITY for a period of three years, which is a drug program. He has been going to AA/NA, he has been involved in "Life Plan for Recovery", as well as "Hands of Peace", where he served as a facilitator. During his free time the inmate serves as a tutor, he works out and reads the Bible. He has not received any 115's since his incarceration.

IV. Family of Origin History
Currently the inmate's mother lives in Palm Springs and his father lives in West Hollywood. The inmate's sister has drug abuse problems. Inmate maintains contact with his parents, his grandmother, cousins, aunts and friends. He receives visits from his parents and occasional visits from relatives or friends. It appears the inmate has a good family support system.

V. Psychosexual Development and Orientation
Sexual development normal. Inmate is of heterosexual orientation.

VI. Marital History
Inmate was married for two years and he describes his marriage as not having been very good and eventually divorced. He has no children.

VII. Military History
Inmate joined the army after leaving high school and was there for three years working as a pharmacy specialist. He states that he was not ready to work or go on to college at that time and due to having a lack of direction and discipline, he thought he could obtain this by joining the Army. He was stationed at Fort Mead in Maryland and received an honorable discharge.

Slater, Michael
CDC #D39052

VIII. Employment/Income History

Inmate states that he occasionally worked for his father in his business as a salesman over the years, but essentially became involved in drug sales and drug usage. Inmate states that after he was asked to leave college he moved to Venice where he lived with his girlfriend and got caught up using speed and selling it in order to support his lifestyle. Eventually he moved to West Hollywood where he continued using speed up until his arrest. Inmate has a history of several arrests, mostly for drug related charges.

IX. Substance Abuse History

Inmate has a history of alcohol abuse, history of cocaine abuse/dependence which began in his early twenties and his drug of choice eventually became speed, which he appears to have become dependent on since his early twenties to the age of thirty when he was arrested. Inmate has attended the AMITY program and he has been attending AA/NA.

X. Psychiatric and Medical History

There is no psychiatric history, no history of suicide attempts, and no history of head injuries or seizures. Currently the inmate does not have any significant medical problems and he is not on any medications.

XI. Plans if Granted Release

Inmate states that he has the possibility of living either with his father or cousin in the LA area or living at the AMITY Ranch in Vista, Ca., which is a drug rehab program. Inmate also says the possibility exists of living with his mother in the Palm Spring area. He has had offers of employment from his father, as well as from a friend. It appears that the inmate has a good family support system and his plans are viable. It is predicted that he would be compliant with conditions of parole and prognosis for community living would be good.

Slater, Michael
CDC #D39052

Clinical Assessment

XII. Current Mental Status/Treatment Needs

This is a mid forties male who makes good eye contact with the examiner. Mood is normal, affect is appropriate. There is no evidence of a thought disorder. Thought processes are goal directed. There is no paranoia, no auditory or visual hallucinations, and no suicidal or homicidal thoughts present. Inmate is oriented to time, person and place. Memory is excellent. Concentration was good and insight and judgement are excellent.

DIAGNOSIS:

I. History of polysubstance abuse/dependence in institutional remission. History of adult anti-social behavior
II. No diagnosis
III. No diagnosis
IV. Stressors of incarceration.
V. GAF of 90.

Inmate does not exhibit any psychiatric symptoms and he is showing an excellent level of functioning.

XIII. Review of Life Crime

Inmate states that at the time the crime occurred he was living alone in West Hollywood, using and selling speed. One day he went to a friend's house to make a drug sale. This friend had a friend who was asleep on the couch, the person who ended up being the victim in this case. The victim awoke, got up from the couch to go to the bathroom and then became involved in an argument with his friend with whom the inmate was trying to do a drug deal. Inmate became upset and took his friend's side as the victim was merely an acquaintance. He decided to scare the victim and took out his gun. He removed the bullets and put one back in, and then played Russian Roulette with the victim with the idea of wanting to terrify the victim and stop the argument. Inmate pulled the trigger believing that he had the chamber set on an empty chamber, but the gun fired and hit the victim in the head. An ambulance was called and the inmate fled the scene in a taxi that was waiting outside.

Slater, Michael
CDC #D39052

Inmate states he was shocked at what occurred and eventually he moved to Studio City where he was arrested a few weeks later. Inmate says that his mind was clouded, he was not thinking straight at the time, especially due to his drug use. It appears that at the time the crime occurred the inmate was caught up in the drug lifestyle and constantly using speed. He had a self-centered way of thinking, considering his needs before anyone else's. Inmate himself reports that he felt he was too good to have to work and thought that working as a drug dealer was a good occupation for him. Predisposing factors related to the crime appears to have been a lack of discipline in being brought up, lack of direction, lack of goals, having a self centered personality, and getting caught up in the drug lifestyle as well as constantly being under the influence. Inmate is able to display a good level of insight in regards to his past actions and he is able to express empathy and remorse for the victim.

XIV. Assessment of Dangerousness

Within a controlled setting it is felt that the inmate's propensity for violence is much less than that of the average inmate withun CDC, and within the community it would be no greater than that of the average citizen, as long as the inmate holds present gains. Significant risk factors which would increase the inmate's risk for violating the law outside prison, would be to fall back into drug dealing and using drugs.

XV. Clinical Observation/Comments/Recommendations

It appears that the inmate's self centered thinking has changed since his arrest and he is able to consider the rights of others before his own rights. He is able to take responsibility for his actions and appears to be committed to remain abstinent from drugs and to maintain gainful employment. While the inmate remains incarcerated he should continue to attend NA/AA and obtain further vocational training, and conditions of parole should include continued attendance to AA/NA as well as obtaining gainful employment

Dennis Payne, M.D., Diplomate
American Board of Psychiatry & Neurology

d: 04/12/00 1033
t: 04/19/00 sg

7-27-09

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL CRAIG SLATER, Petitioner, v. WILLIAM SULLIVAN, et al., Respondents.	1:08-CV-00571 OWW JMD HC FINDINGS AND RECOMMENDATION REGARDING PETITION FOR WRIT OF HABEAS CORPUS

Petitioner Michael Slater ("Petitioner") is a State prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

PROCEDURAL HISTORY

Petitioner is currently in the custody of the California Department of Corrections and Rehabilitation at the California Substance Abuse Treatment Facility in Corcoran, California. (Pet. at 2). Petitioner is serving a sentence of seventeen years to life, pursuant to a conviction on February 20, 1986, of second degree murder with a firearm enhancement. (Pet at 2: Answer at 1)

Petitioner does not challenge his conviction in this action. Instead, Petitioner challenges the decision by the California Board of Parole Hearings (the "Board"), whom he appeared before in October 2005 for a parole consideration hearing. (Pet. M. & A. at 1). The Board found Petitioner unsuitable for parole.

Petitioner subsequently filed a petition for writ of habeas corpus with the California Superior Court, the California Court of Appeal, and the California Supreme Court, challenging the Board's denial of parole. (*See* Answer Exs. 1, 3, 5). The California Superior Court was the only State court

District Court
California

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to issue a reasoned opinion. (*See* Answer Ex. 2). The California Court of Appeal and the Supreme Court issued summary denials of Petitioner's request for relief. (Answer Exs. 4, 6)

On February 6, 2008, Petitioner filed the instant federal petition for writ of habeas corpus in the Central District of California. (Court Doc. 1). The case was transferred to this Court on April 21, 2008.

On September 3, 2008, Respondent filed a response to the petition. Respondent admits that Petitioner has exhausted his state remedies and that the instant petition is timely. (Answer at 2).

On October 27, 2008, Petitioner filed a reply to the Respondent's answer.

FACTUAL BACKGROUND

As the facts of the commitment offense are relevant to determining whether Petitioner is suitable for parole, the Court recites the facts as stated in the record of the parole hearing. *See* Cal. Code Regs., tit. 15, § 2402(c)(1). The Board first incorporated into the record a summary of the offense, which stated that:

> On 7/9 of 1985 at 9:50 a.m., West Hollywood Sheriff Officers responded to reports of an injured person. When officers arrived, they observed a victim who had a large amount of blood on the right side of his head. Paramedics arrived and transported the victim to Cedars Sinai Hospital. The victim was pronounced dead at 1:05 p.m. as the result of severe brain damage and cardiac arrest. An investigation was conducted. Witnesses state that [Petitioner] arrived at the residence at approximately 9:50 a.m. on 7/9 of '85. He was allowed to enter and was led to a bedroom area where he sat for about three minutes. The victim, Gary Boice (phonetic), came a few minutes later. [Petitioner] quickly got up and stepped i front of Boice and prevented him from moving any further. [Petitioner] reached into a briefcase that he was carrying and pulled out a grey revolver. He opened the cylinder fo the revolver, spun it around, and closed it. He told the victim, 'This is what we do to people.' He pointed the gun at Boice's right temple, fired one round to the right side of the victim's head. [Petitioner] then said, "Oh, my God. Oh, my God. I'm sorry. I'm sorry.' [Petitioner] then fled, taking the gun and briefcase.

(Traverse Ex. B, Parole Hearing Transcript, at 7-9).

Additionally, the Board read into the record Petitioner's version of events, obtained from a previous parole hearing, which stated:

> I took a taxi to Gil's to pop in and say a brief hello, and possibly sell some drugs. We were talking in his bedroom with[sic] Gary, who had been sleeping on the living room couch, woke up, and walked by the bedroom door on his way to the bathroom. Gil stopped him and they began to argue about money. With the taxi waiting downstairs, I soon became impatient. To put a stop to their arguing and allow me to finish up with Gil, I decided to scare Gary. Within their view, I removed all the bullets from my revolver except one. I feigned kind of a Russian Roulette by

> spinning the cylinder, while secretly watching to make sure the bullet was not in firing position. Then I stepped up to Gary and pointed the gun to his head. I said something to Gil along the lines of 'This is how to play.' And I pulled the trigger. To my shock, and everyone else's, the gun fired, shooting Gary in the head, dropping him to the floor. Pandemonium erupted. I yelled for Gil to call an ambulance, which either he or Jackie, who had been cooking in the kitchen, immediately did. After I calmed down, I thought there wasn't anything I could do to help Gary, and I wasn't ready to turn myself over to the law. So I left with Gil and Jackie and fled the apartment.

(Id. at 9-11).

DISCUSSION

I. Jurisdiction and Venue

A person in custody pursuant to the judgment of a State court may petition a district court for relief by way of a writ of habeas corpus if the custody is in violation of the Constitution, laws, or treaties of the United States. 28 U.S.C. § 2254(a); 28 U.S.C. § 2241(c)(3); *Williams v. Taylor*, 529 U.S. 362, 375 n.7 (2000). Petitioner asserts that he suffered violations of his rights as guaranteed by the United States Constitution stemming from the Board's denial of parole. Petitioner is currently incarcerated at Corcoran State Prison, which is located in Kings County. Kings County is within this judicial district. 28 U.S.C. § 84(b). Thus, the Court has jurisdiction over and is the proper venue for this action. *See* 28 U.S.C. § 2241(d).

II. AEDPA Standard of Review

All petitions for writ of habeas corpus filed after 1996 are governed by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), enacted by Congress on April 24, 1996. *Lindh v. Murphy*, 521 U.S. 320, 326-327 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9th Cir. 1997), *cert. denied*, 522 U.S. 1008, 118 S.Ct. 586 (1997) (quoting *Drinkard v. Johnson*, 97 F.3d 751, 769 (5th Cir. 1996), *cert. denied*, 520 U.S. 1107 (1997), *overruled on other grounds by Lindh*, 521 U.S. 320 (holding AEDPA only applicable to cases filed after statute's enactment)). The instant petition was filed in 2008 and is consequently governed by AEDPA's provisions. *Lockyer v. Andrade*, 538 U.S. 63, 70 (2003).

While Petitioner does not challenge his underlying conviction, the fact that Petitioner's custody arises from a State court judgment renders Title 28 U.S.C. section 2254 the exclusive vehicle for Petitioner's habeas petition. *Sass v. California Board of Prison Terms*, 461 F.3d 1123,

1126-1127 (9th Cir. 2006) (quoting *White v. Lambert*, 370 F.3d 1002, 1006 (9th Cir. 2004) in holding that § 2254 is the exclusive vehicle for a habeas petitioner in custody pursuant to a State court judgment even though he is challenging the denial of his parole). Under AEDPA, a petition for habeas corpus "may be granted only if [Petitioner] demonstrates that the State court decision denying relief was 'contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States.'" *Irons v. Carey*, 505 F.3d 846, 850 (9th Cir. 2007) (quoting 28 U.S.C. § 2254(d)(1)); *see also Lockyer*, 538 U.S. at 70-71.

As a threshold matter, this Court must "first decide what constitutes 'clearly established federal law, as determined by the Supreme Court of the United States.'" *Lockyer*, 538 U.S. at 71 (quoting 28 U.S.C. § 2254(d)(1)). In ascertaining what is "clearly established federal law," this Court must look to the "holdings, as opposed to the dicta, of [the Supreme Court's] decisions as of the time of the relevant state court decision." *Id.* (quoting *Williams*, 592 U.S. at 412). "In other words, 'clearly established federal law' under § 2254(d)(1) is the governing legal principle or principles set forth by the Supreme Court at the time the State court renders its decision." *Id.*

Finally, this Court must consider whether the State court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law." *Lockyer*, 538 U.S. at 72, (quoting 28 U.S.C. § 2254(d)(1)). "Under the 'contrary to' clause, a federal habeas court may grant the writ if the State court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the State court decides a case differently than [the] Court has on a set of materially indistinguishable facts." *Williams*, 529 U.S. at 413; *see also Lockyer*, 538 U.S. at 72. "Under the 'unreasonable application clause,' a federal habeas court may grant the writ if the State court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Williams*, 529 U.S. at 413. "[A] federal court may not issue the writ simply because the court concludes in its independent judgment that the relevant State court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." *Id.* at 411. A federal habeas court making the "unreasonable application" inquiry should ask whether the State court's application of clearly established law was "objectively unreasonable." *Id.* at 409.

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Petitioner bears the burden of establishing that the State court's decision is contrary to or involved an unreasonable application of United States Supreme Court precedent. *Baylor v. Estelle*, 94 F.3d 1321, 1325 (9th Cir. 1996). Although only Supreme Court law is binding on the states, Ninth Circuit precedent remains relevant persuasive authority in determining whether a State court decision is objectively unreasonable. *See Clark v. Murphy*, 331 F.3d 1062, 1069 (9th Cir. 2003); *Duhaime v. Ducharme*, 200 F.3d 597, 600-01 (9th Cir. 1999).

AEDPA requires that a federal habeas court give considerable deference to State court decisions. The State court's factual findings are presumed correct. 28 U.S.C. § 2254(e)(1). Furthermore, a federal habeas court is bound by a State's interpretation of its own laws. *Souch v. Schaivo*, 289 F.3d 616, 621 (9th Cir. 2002), *cert. denied*, 537 U.S. 859 (2002), *rehearing denied*, 537 U.S. 1149 (2003).

III. Review of Petitioner's Claim

Petitioner raises three grounds for relief, all alleging that the Board's decision deprived him of the right to due process of the law. (*See* Pet. M. & A.). In his first ground for relief, Petitioner contends that the Board's reliance on the commitment offense to deny him parole violated his constitutional rights. (Id. at 1-4). Petitioner's second ground for relief alleges that the Board improperly relied upon a rules violation to find him unsuitable for parole. (Id. at 5-6). Petitioner asserts as his third ground for relief that his due process rights were violated by the Board's reliance on immutable factors, including Petitioner's criminal misconduct prior to incarceration. (Id. at 7-8). Explicit in each ground for relief is Petitioner's contention that the denial of parole was arbitrary and not supported by "some evidence" as required by the Due Process Clause. The Court initially examines whether the State court's decision, upholding the denial of parole, is an unreasonable application of clearly established federal law. *See Williams*, 529 U.S. at 407-408 (explaining that where there is no factually on-point Supreme Court case, the State court's determination is subject to the unreasonable application clause of 28 U.S.C. § 2254).

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A. Legal Standard for Denial of Parole

"We analyze a due process claim in two steps. '[T]he first asks whether there exist a liberty or property interest which has been interfered with by the State, the second examines whether the procedures attendant upon that deprivation were constitutionally sufficient.'" *Sass*, 461 F.3d at 1127. The United States Constitution does not, by itself, create a protected liberty interest in a parole date. *Jago v. Van Curen*, 454 U.S. 14, 17-21 (1981). In briefs submitted to the Court, Respondent argues that Petitioner does not have a liberty interest in parole despite recognizing the existence of Ninth Circuit authority to the contrary. (Answer at 2-3). The Ninth Circuit has held that a prisoner possess a liberty interest in parole where mandatory language in a State's statutory scheme for parole creates a presumption "that parole release will be granted' when or unless certain designated findings are made, and thereby give rise to a constitutional liberty interest.'" *McQuillion v. Duncan*, 306 F.3d 895, 901 (9th Cir. 2002) (quoting *Greenholtz v. Inmates of Nebraska Penal*, 442 U.S. 1, 12 (1979) in holding that California's parole scheme gives rise to a cognizable liberty interest in release on parole). California Penal Code section 3041 contains the requisite mandatory language, thus vesting California prisoners "whose sentence provide for the possibility of parole with a constitutionally protected liberty interest in the receipt of a parole release date, a liberty interest that is protected by the procedural safeguards of the Due Process Clause." *Irons*, 505 F.3d at 850; *see also McQuillion*, 306 F.3d at 903; *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003). Consequently, the Court finds that Petitioner has a protected liberty interest in a parole date.

A finding that a liberty interest exists does not end the Court's inquiry as the Due Process Clause is not violated where the denial of a petitioner's liberty interests follows the State's observance of certain procedural safeguards. *See Greenholtz*, 442 U.S. at 12. In addition to arguing that Petitioner has no federally protected liberty interest in parole, Respondent alternatively argues due process merely entitles Petitioner the right to be heard, advance notice of the hearing, and for the Board to state their reasons for denial. (Answer at 3). This contention is based on the argument that the "some evidence" standard does not constitute clearly established federal law and is not applicable to parole denials. (*Id.* at 5). Respondent is correct in one respect, a parole release determination is not subject to all of the due process protections of an adversarial proceeding. *See Pedro v. Oregon*

Parole Board, 825 F.2d 1396, 1398-99 (9th Cir. 1987). "[S]ince the setting of a minimum term is not part of a criminal prosecution, the full panoply of rights due a Petitioner in such a proceeding is not constitutionally mandated, even when a protected liberty interest exists." *Id.* at 1399; *Jancsek v. Oregon Bd. of Parole*, 833 F.2d 1389, 1390 (9th Cir. 1987). Thus, an inmate is entitled to receive advance written notice of a hearing, be afforded an "opportunity to be heard" and told why "he falls short of qualifying for parole." *Greenholtz*, 442 U.S. at 16; *see also Pedro*, 825 F.2d at 1399. Here, the Court notes that Petitioner does not allege that he was deprived of any of these rights.

The Ninth Circuit has consistently recognized that a prisoner's due process rights are implicated where there is no evidence to support the denial of parole. *Irons*, 505 F.3d at 851; *see also Sass*, 461 F.3d at 1128-1129. "In *Superintendent, Mass. Correc. Inst. v. Hill* [472 U.S. 445 (1985)] the Supreme Court held that 'revocation of good time does not comport with 'the minimum requirements of procedural due process' unless the findings of the prison disciplinary board are supported by some evidence in the record.'" *Sass*, 461 F.3d at 1128 (citations omitted). The Ninth Circuit has held that the same standard of "some evidence" that applies to the revocation of good time also extends to parole determinations and that this same standard of judicial review applies to habeas petitions regarding parole denials. *Irons*, 505 F.3d at 851; *Sass*, 461 F.3d at 1128-1129. This evidentiary standard prevents arbitrary deprivations of the prisoner's liberty interest without imposing undue administrative burdens or threatening institutional interests. *Hill*, 472 U.S. at 455. Thus, the Court finds that the "some evidence" standard is applicable to Petitioner's denial of parole.

The inquiry of "whether a state parole board's suitability determination was supported by 'some evidence'" is framed by the California statutes and regulations governing parole suitability. *Irons*, 505 F.3d at 851; *see Briggs*, 334 F.3d at 915. Significantly, California's Supreme Court has consistently found that in order to comport with due process, the Board's denial of parole must be supported by "some evidence." *In re Dannenberg*, 34 Cal.4th 1061, 1071 (Cal. 2005); *In re Rosenkrantz*, 26 Cal.4th 616, 625-626 (Cal. 2002) (applying some evidence standard to governor's authority, under Article V, section 8(b) of the California Constitution, to reverse a grant of parole). A federal habeas court defers to a state court's interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (citing *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) and *Mullaney v. Wilbur*, 421

U.S. 684, 691 (1975), for the proposition that, "a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus"). Thus, Respondent's contention must fail as California law clearly provides for the additional procedural safeguard of requiring some evidence to support the Board's denial of parole.

The dispositive inquiry now before this Court is whether the Superior Court's decision was an unreasonable application of the "some evidence" standard. This inquiry is framed by the statutes and regulations governing parole suitability determinations in California. *Irons*, 505 F.3d at 851; *Briggs*, 334 F.3d at 915. California law provides that after an eligible life prisoner has served the minimum term of confinement required by statute, the Board "shall set a release date unless it determines that the gravity of the current convicted offense or offenses, or the timing and gravity of current or past convicted offense or offenses, is such that consideration of the public safety requires a more lengthy period of incarceration for" the prisoner. Cal. Penal Code § 3041(b). "[I]f in the judgment of the panel the prisoner will pose an unreasonable risk of danger to society if released from prison," the prisoner must be found unsuitable and denied parole. Cal. Code Regs., tit. 15, § 2402(a); *see In re Dannenberg*, 34 Cal.4th at 1078, 1080. The Board decides whether a prisoner is too dangerous to be suitable for parole by applying factors set forth in the California Code of Regulations. *See* Cal. Code Regs., tit. 15, § 2402; *Irons*, 505 F.3d at 851-852; *Biggs*, 334 F.3d at 915-916. The regulations permit consideration of "all relevant, reliable information available to the panel," and explicitly calls for consideration of "the base and other commitment offenses, including behavior before, during and after the crime."[1] Cal. Code Regs., tit. 15, § 2402(b). Factors supporting a finding of unsuitability for parole include: the underlying offense was carried out in an "especially heinous, atrocious or cruel manner"; a record, prior to incarceration for the underlying offense, of violence; a history of unstable relationships with others; and serious misconduct while

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[1]The statute specifically states: "All relevant, reliable information available to the panel shall be considered in determining suitability for parole. Such information shall include the circumstances of the prisoner's social history; past and present mental state; past criminal history, including involvement in other criminal misconduct which is reliably documented; the base and other commitment offenses, including behavior before, during and after the crime; past and present attitude toward the crime; any conditions of treatment or control, including the use of special conditions under which the prisoner may safely be released to the community; and any other information which bears on the prisoner's suitability for release. Circumstance which taken alone may not firmly establish unsuitability for parole may contribute to a pattern which results in a finding of unsuitability." Cal. Code Regs., tit. 15, § 2402(b).

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incarcerated. Cal. Code Regs., tit. 15, § 2402 (c); *see also In re Shaputis*, 44 Cal.4th 1241, 1257 n. 14 (Cal. 2008).

The California Supreme Court has recently held that even where the commitment offense was particularly egregious, reliance on this immutable factor would violate a petitioner's due process rights under the regulations and statutes governing parole suitability in California where:

> evidence of the inmate's rehabilitation and suitability for parole under the governing statutes and regulations is overwhelming, the only evidence related to unsuitability is the gravity of the commitment offense, and that offense is both temporally remote and mitigated by circumstances indicating the conduct is unlikely to recur, the immutable circumstance that the commitment offense involved aggravated conduct does not provide 'some evidence' *inevitably* supporting the ultimate decision that the inmate remains a threat to public safety.

In re Lawrence, 44 Cal.4th 1181, 1191 (Cal. 2008) (emphasis in original).

In *Lawrence*, the California Supreme Court found that a commitment offense that had occurred over thirty years prior to the Governor's reversal of a parole grant was no longer probative of the petitioner's current dangerousness. The *Lawrence* court found that the intervening twenty-four years in which petitioner, now age sixty-one, had demonstrated, "extraordinary rehabilitative efforts specifically tailored to address the circumstances that led to her criminality, her insight into her past criminal behavior, her expressions of remorse, her realistic parole plans, the support of her family, and numerous institutional reports justifying parole" rendered "the unchanging factor of the gravity of petitioner's commitment offense" no longer probative of "her current threat to public safety, and thus provides no support for the Governor's conclusion that petitioner is unsuitable for parole at the present time." *Id.* at 1226.

The *Lawrence* court noted however that there were some circumstances where reliance on a commitment offense would comport with due process, such as where the conviction offense was so heinous, atrocious, or cruel that the gravity of the crime itself established current dangerousness. *Id.* at 1228. Furthermore, the *Lawrence* court observed that a discipline-free record while incarcerated does not automatically render the commitment offense unpredictive of current dangerousness. *Id.* (citing *Lawrence*'s companion case, *In re Shaputis*, 44 Cal.4th 1241, 1259-1260 (Cal. 2008), in concluding that lack of insight into the commitment offense rendered aggravating factor of the crime probative of petitioner's current dangerousness such that Governor's reversal of parole was neither

arbitrary or capricious despite an inmate's discipline-free record during incarceration).

B. State Court Decision

After reviewing the record, the Court finds that the California Superior Court unreasonably applied the some evidence standard. *See* 28 U.S.C. § 2254(d)(1). The State court's decision was unreasonable as it conflated the ultimate inquiry, whether Petitioner was currently dangerous, with the inquiry of whether "some evidence" supported an unsuitability factor. The California Supreme Court in *Lawrence* held that, "[t]he relevant determination for the Board and the Governor is, and always has been, an individualized assessment of the continuing danger and risk to public safety posed by the inmate." *Id.* at 1227. The court noted that such a holding was not novel as this "conclusion that current dangerousness (rather than the mere presence of a statutory unsuitability factor) is the focus of the parole decision *is rooted in the governing statute*." *Id.* at 1210-1211 (emphasis added). The *Lawrence* court further reiterated that the decision did not mark a break with previous State court precedents in discussing why its decision would not produce a wave of reversals, explaining that even prior to *Lawrence*, the "overwhelming majority" of State appellate court's decision affirming a denial of parole "was not founded solely upon the conclusion that the circumstances of the commitment offense were more than what was minimally required to obtain a conviction of that offense, but rather upon the presence of other additional statutory factors establishing unsuitability." *Id.* at 1228.

Here, it is obvious that the State court conflated the two inquiries as the court assumed that the modicum of evidence supporting a finding that the motive for the crime was trivial meant that Petitioner was currently dangerous. The Superior Court's analysis of whether there was some evidence to support the Board's finding was limited to the following:

> [T]here is some evidence to support the board's finding that 'the motive for the crime is inexplicable or very trivial in relation to the offense'...The Board concluded that the motive for killing this man was a 'cruel joke.' [Citation] Petitioner claimed that the decided to point the gun at the victim because he was impatient at the interference of his drug sale. *This motive is materially less significant than those that conventionally drive people to commit murder; therefore there is some evidence to support the Board's conclusion that petitioner continues to pose a risk of danger to society.*

(Answer Ex. B at 2-3) (emphasis added).

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Despite the Superior Court's recognition that its ultimate inquiry was with regard to Petitioner's current dangerousness, the Superior Court's decision focused exclusively on whether there was some evidence to support the trivial nature of the motive. The Superior Court further failed to explain how the trivial nature of the motive, for a crime committed over twenty years previously, was probative of Petitioner's *current* dangerousness. Considering there is a lack of evidence in the record to indicate that Petitioner actually intended to kill the victim, as discussed *infra*, it is unclear how this factor holds any value in determining Petitioner's current dangerousness. Thus, the State court's *sole* reliance on the trivial nature of the motive was an unreasonable application of the some evidence standard.

C. Parole Board Decision

Therefore, the Court proceeds to examine whether there was some evidence, outside of that cited by the Superior Court, to support the Board's denial of parole. As a federal habeas court may only grant relief if a Petitioner's constitutional right is violated, the existence of some evidence in record would preclude the Court from granting the petition. *See Butler v. Curry*, 528 F.3d 624, 641 (9th Cir. 2008) (citing 28 U.S.C. § 2241(c)(3) in noting that a federal habeas court's finding that State court's decision is contrary to established federal law does not end that court's inquiry as, "[o]ur power to grant the writ of habeas corpus to a state inmate depends on his actually being 'in custody in violation of the Constitution or laws ... of the United States'").

The Board noted that finding Petitioner unsuitable for parole was a difficult decision that they "wrestled with." (Traverse Ex. B at 51). Ultimately, the Board relied on three factors to find that Petitioner currently posed an unreasonable risk of danger to the public safety: (1) the commitment offense, (2) prior criminal misconduct, and (3) unstable social history.[2] After reviewing the record, the Court finds that the record is devoid of evidence to support the Board's finding that Petitioner currently posed an unreasonable risk of danger to the public.

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[2]Contrary to Petitioner's assertion otherwise, his disciplinary infraction does not seemed to have weighed against him. The Board stated with regards to the infraction, "[w]e're not going to get too excited. I asked my partner if he had to dry his laundry in his cell, he would be accused of putting up a huge tent. And he'd get a 128 in a minute. And so you should be commended on one or two chronos [sic] in 20 years." (Traverse Ex. B at 53).

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1. Probative Value of Commitment Offense

State regulations permit consideration of the following factors in determining whether the commitment offense favors the denial of parole: the offense was carried out in a dispassionate and calculated manner, such as an execution-style murder; the victim was abused, defiled or mutilated during or after the offense; the offense was carried out in a manner which demonstrates an exceptionally callous disregard for human suffering; the motive for the crime is inexplicable or very trivial in relation to the offense. Cal. Code Regs., tit. 15, § 2402(c)(1). Pursuant to California law, "all second degree murders by definition involve some callousness–i.e., lack of emotion or sympathy, emotional insensitivity, indifference to the feelings and suffering of others. As noted, however, parole is the rule, rather than the exception, and a conviction for second degree murder does not automatically render one unsuitable." *In re Smith*, 114 Cal.App.4th 343, 366 (Cal. Ct. App. 2003) (citations omitted); *see also People v. Nieto Benitez*, 4 Cal.4th 91, 102 (Cal. 1992) (stating "[s]econd degree murder is defined as the unlawful killing of a human being with malice aforethought, but without the additional elements–i.e., wilfulness, premeditation, and deliberation–that would support a conviction of first degree murder"). Thus, a showing of exceptional callousness, cruelty, or dispassion for human suffering requires evidence that "the offense in question must have been committed in a more aggravated or violent manner than that ordinarily shown in the commission of second degree murder." *In re Scott*, 119 Cal.App.4th 871, 891 (Cal. Ct. App. 2004), *see also In re Dannenberg*, 34 Cal.4th at 1095 (quoting *In re Rosenkrantz*, 29 Cal.4th 616, 683 (Cal. 2002) for the proposition that reliance on commitment offense as some evidence requires aggravating facts beyond the minimum elements of the offense).

In discussing the commitment offense, the Board concluded that the manner in which the crime was committed was "cruel and callous, dispassionate, calculated." (Traverse Ex. B at 51). The Board seems to have based this finding on the motive of the crime as the shooting itself does not seem particularly egregious. A motive is inexplicable or trivial where it "is one that is unexplained or unintelligible, as where the commitment offense does not appear to be related to the conduct of the victim and serves no other discernible purposes. A person whose motive for a criminal act cannot be explained or is unintelligible is therefore unusually unpredictable and dangerous." *In re*

Scott, 119 Cal.App.4th at 893 (further noting that "to fit the regulatory description, the motive must be materially less significant (or more 'trivial') than those which conventionally drive people to commit the offense in question, and therefore more indicative of a risk of a danger to society if the prisoner is released than is ordinarily presented"); *see also In Barker*, 151 Cal.App.4th 346, 374 (Cal. Ct. App. 2007) (quoting *in re Scott*, 119 Cal.App.4th at 893 for the proposition that, "[g]iven the high value our society places upon life, there is no motive for unlawfully taking the life of another human being that could not reasonably be deemed 'trivial.' The Legislature has foreclosed that approach, however, by declaring that murderers with life sentences must 'normally' be given release dates when they approach their minimum eligible parole dates").

Here, the record does not contain any evidence that Petitioner's crime exceeded the minimum necessary for second degree murder. The Board itself seemed to have questioned whether Petitioner had the intent necessary for second degree murder, stating that they were unsure if Petitioner meant to kill the victim. (Traverse Ex. B at 51, 52). This statement is based on the factual summaries read into the record that indicates Petitioner intended to scare the victim when he pointed the gun at the victim's head. (Id.). Thus, the Board's finding that the crime was particularly egregious is questionable considering the Board itself questioned whether the crime met the minimum necessary for second degree murder.

More importantly, even if the crime was particularly egregious, the Board failed to explain how the commitment offense offers probative value of Petitioner's current dangerousness considering the time that has lapsed since the crime was committed. *See Irons*, 505 F.3d at 854 (recognizing that continued incarceration based solely on immutable factors, such as the commitment offense, may eventually rise to the level of a due process violation); *see also Biggs*, 334 F.3d at 917; *In re Lawrence*, 44 Cal.4th at 1228 (rejecting use of the commitment offense to constitute some evidence where the commitment offense is no longer probative of Petitioner's current dangerousness).[3] The Board does not state, nor does the Court find it probable, that the commitment offense is likely to reoccur based solely on Petitioner's motivation. The current case is

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[3] *Lawrence*, 44 Cal.4th at 1228, made an exception on the reliance of the commitment offense for crimes that were so heinous, atrocious, or cruel that the gravity of the offense itself established current dangerousness. The Court does not find that the instant case to qualify as one of those offenses.

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distinguishable from *Lawrence*'s companion case, *In re Shaputis*. In *Shaputis*, the denial of parole did not violate the petitioner's right to due process as other non-immutable factors existed to support the finding that Shaputis was currently dangerous, such as a lack of remorse. Here, Petitioner has not "failed to make efforts toward rehabilitation... continued to engage in criminal conduct postincarceration, or has shown a lack of insight or remorse," such that "the aggravated circumstances of the commitment offense may well continue to provide 'some evidence' of current dangerousness even decades after commission of the offense." *Lawrence*, 44 Cal.4th at 1228. Rather, as discussed *infra*, Petitioner's conduct in the intervening two decades was exemplary and demonstrated strong evidence of rehabilitation. *See In re Rico*, 171 Cal.App.4th 659, 680 (Cal. Ct. App. 2009). Thus, the Board's reliance on the commitment offense is erroneous as the commitment offense does not provide insight into whether Petitioner is currently dangerous.

2. Prior Criminal Misconduct

The second factor the Board relied upon in denying Petitioner parole was prior criminal misconduct. California's regulations permit consideration of "all relevant, reliable information available to the panel...such information shall include...past criminal history, including involvement in other criminal misconduct which is reliably documented." Cal. Code Regs., tit. 15, § 2402(b). However, it should be noted that only "previous record of violence" is explicitly listed as an unsuitability factor. Cal. Code Regs., tit. 15, § 2402(c)(2) (stating "[c]ircumstances tending to indicate unsuitability include...[t]he prisoner on previous occasions inflicted or attempted to inflict serious injury on a victim, particularly if the prisoner demonstrated serious assaultive behavior at an early age"). Thus, while the Board properly considered Petitioner's prior criminal misconduct, the probative value of Petitioner's prior is questionable at best.

Petitioner's prior criminal misconduct does not evidence an escalating pattern whereby Petitioner progressed from non-violent to violent offenses. Rather, Petitioner's entire criminal history consists of only one violent offense–specifically, the commitment offense. As summarized by the Board, Petitioner's escalating pattern of criminal misconduct consisted of stealing, being a drug dealer, not paying a hotel bill, and various drug violations. (Traverse Ex. B at 52-53). The non-violent nature of Petitioner's criminal misconduct, which mainly involved possession of narcotics,

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lessens the probative value of those offenses in determining whether Petitioner currently poses an unreasonable risk of danger to the public safety.

Similar to the commitment offense, the intervening twenty years have also lessened the probative value of these offenses. As noted by the Board, the entirety of Petitioner's prior criminal misconduct relate to his use of drugs. Petitioner's record illustrates that he has participated in self-help programming, such as Alcoholics and Narcotics Anonymous, and has not used drugs in the intervening twenty year period. Thus, for the same reasons in which the Board's reliance on the commitment offense was erroneous, the Board's reliance on Petitioner's criminal misconduct prior to incarceration is also misguided. "[T]he Board's decision identified immutable factors, the commitment crime and [prior criminal misconduct], but it did not expressly rely upon petitioner's lack of insight or ability to conform his behavior to the law upon release and failed to relate the identified immutable factors to circumstances that would make them probative of petitioner's current dangerousness." *In re Lazor*, 172 Cal.App.4th 1185, 1203 (Cal. Ct. App. 2009). Nothing in the over twenty year period in which Petitioner has been incarcerated demonstrates that these two immutable factors continue to be probative of Petitioner's current dangerousness in light of the rehabilitative measures undertaken by Petitioner.

3. No Reliable Evidence of Unstable Social History

"Stable relationships with others favor parole [citation] while 'a history of unstable or tumultuous relationships with others' weighs against parole [citation]." *In re DeLuna*, 126 Cal.App.4th 585, 594 (Cal. Ct. App. 2005) (quoting Cal. Code Regs., tit. 15, §§ 2402 (c)(3), (d)(2)). The Board seemingly found that Petitioner had an unstable social history based solely on his two year marriage and divorce despite the fact that Petitioner's family wrote support letters offering him residences and jobs. It is puzzling to the Court how one failed relationship resulting in a divorce can constitute "a history of unstable or tumultuous relationships with others." Cal. Code Regs., tit. 15, § 2402(c)(3); *see Bair v. Folsom State Prison*, 2005 WL 2219220 (E.D. Cal. 2005) (noting that, "[h]aving been divorced does not necessarily demonstrate a history of unstable or tumultuous relationships" in finding that *five* divorces does demonstrate history of unstable relationships); *see also Saunders v. Carey*, 2009 WL 426650 (E.D. Cal. 2009) (noting that there is no reliable evidence

of an unstable social history indicative of current dangerousness even where petitioner had been divorced twice). Indeed, the phrasing of the statute seems to indicate, specifically the use of the phrase "a history" and the plural form of "relationships with others", would suggest that more than one failed relationship is required. More importantly, though, it is unclear how Petitioner's failed marriage over twenty years ago evidences his current dangerousness.

Rather, the intervening events of the last two decades strongly suggests that Petitioner has rehabilitated and no longer poses an unreasonable risk of danger to society. The Board did discuss the plethora of factors tending to support suitability. (Traverse Ex. B at 54). As factors tending to support parole, the Board commended Petitioner for his disciplinary record while incarcerated noting the existence of only one disciplinary infraction for non-violent behavior.[4] (Id. at 53). Petitioner participated in vocational courses for optical technoloy, plumbing, roofing and carpentry, eventually obtaining an optician's certificate license. (Id. at 21-22, 31). Petitioner improved himself educationally, taking classes in management, accounting, health, and business mathematics. (Id. at 24). Petitioner volunteered as a tutor and coordinator for a literacy program for fellow inmates. (Id. at 27). Furthermore, Petitioner completed self-help classes, including courses in self-confrontation and anger management, while attending weekly Alcoholics Anonymous meetings. (Id. at 25-26). The psychological evaluation was favorable as the report noted that Petitioner had "good insight into his behavior and the emotionality that went with it," and that Petitioner has "gained knowledge and insight into the danger of drugs." (Id. at 29). More importantly, though, the psychological evaluation revealed that Petitioner would pose less risk of danger than the average citizen if released into the community. (Id. at 55, 29). The record also reveals that Petitioner has viable parole plans, with both parents offering him a place of residence and a job.[5] (Id. at 55).

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[4]The record evidences that this infraction resulted from Petitioner hanging his laundry in his cell, an activity referred to as tenting.

[5]The Board's criticism that Petitioner lacks a "Plan B" in case "[w]e do have Katrina come through West LA and destroy your commercial property, you don't want it anymore" is not supported by the record, which indicates Petitioner's mother also offered her residence to Petitioner and that Petitioner has a vocational skills in manufacturing optical lenses. (*See* Traverse Ex. B at 17, 21, 30-32).

In sum, it would seem that "all of the information in [the] postconviction record supports the determination that the inmate is rehabilitated and no longer poses a danger to public safety." *See Lawrence*, 44 Cal.4th at 1227. While the "some evidence standard is minimal, and assures that 'the record is not so devoid of evidence that the findings of the disciplinary board were without support or otherwise arbitrary,'" the Court finds record here is devoid of any evidence demonstrating that Petitioner poses a current risk of unreasonable danger to the public safety. *See Sass*, 461 F.3d at 1129 (quoting *Hill*, 472 U.S. at 457).

REMEDY

In examining the remedies available to Petitioner, the Court initially notes that "federal habeas courts have 'broad discretion in conditioning a judgment granting habeas relief' and in 'dispos[ing] of habeas corpus matters 'as law and justice require.'" *Milot v. Haws*, 2009 WL 2046857, *3 (C.D. Cal. 2009) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987)); *see Burnett v. Lampert*, 432 F.3d 996, 999 (9th Cir. 2005) (stating that federal courts "have a fair amount of flexibility in fashioning specific habeas relief"); *see also Sanders v. Ratelle*, 21 F.3d 1446, 1461 (9th Cir. 1994) (noting that federal habeas court is vested with the largest power to control and direct the form of judgment to be entered). The district court in *Milot* rejected the assertion that the only remedy available to a habeas petition challenging the denial of parole by the Board was a new parole consideration hearing, noting that "[i]n the context of parole decisions that violate due process, there is no federal law holding that the only remedy available to a federal habeas court is a remand to the Board for a new hearing." *Milot*, 2009 WL 2046857, *3. Additionally, the district court observed in *Milot* that recent decisions by the California courts suggest that California law permits a remedy beyond a new hearing without restrictions on the Board's consideration. *Id* at 4.

RECOMMENDATION

Therefore, in accordance with the above, IT IS HEREBY RECOMMENDED that:

1. Petitioner's application for a writ of habeas corpus be GRANTED; and
2. Judgment be entered granting a writ of habeas corpus as follows: The Board shall find Petitioner suitable for parole at a hearing to be held within 30 days of the order adopting this decision, unless new evidence of his conduct in prison or change in

mental status subsequent to the October 2005 parole consideration hearing is introduced that is sufficient to support a finding that Petitioner currently poses an unreasonable risk of danger to society if released on parole; and in the absence of any such new evidence showing Petitioner's unsuitability for parole, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has passed, Respondent shall, within ten (10) days of the Board's hearing, release Petitioner from custody. With respect to his presumptive period of parole, Petitioner is to be credited for any time that has lapsed since the release date calculated by the Board or when a finding of suitability at the October 2005 parole consideration hearing would have become final pursuant to California Penal Code sections 3041(b) and 3041.2(a)), whichever is later.

This Findings and Recommendation is submitted to the Honorable Oliver W. Wanger, United States District Court Judge, pursuant to the provisions of 28 U.S.C. § 636(b)(1)(B) and Rule 72-304 of the Local Rules of Practice for the United States District Court, Eastern District of California. Within thirty (30) days after being served with a copy, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendation." Replies to the objections shall be served and filed within ten (10) court days (plus three days if served by mail) after service of the objections. The Court will then review the Magistrate Judge's ruling pursuant to 28 U.S.C. § 636(b)(1)(c). The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. *Martinez v. Ylst*, 951 F.2d 1153 (9th Cir. 1991).

IT IS SO ORDERED.

Dated: July 27, 2009

/s/ John M. Dixon
UNITED STATES MAGISTRATE JUDGE

MIME-Version:1.0 From:caed_cmecf_helpdesk@caed.uscourts.gov
To:caed_cmecf_nef@localhost.localdomain Message-Id: Subject:Activity in Case
1:08-cv-00571-OWW-JMD (HC) Slater v. Sullivan et al Findings and Recommendations (Motion)
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Case Name: (HC) Slater v. Sullivan et al
Case Number: 1:08-cv-571
Filer:
Document Number: 20
Docket Text:
FINDINGS and RECOMMENDATIONS recommending that Petitioner's Application for a [2] Writ of Habeas Corpus be Granted and Judgment be entered Granting a Writ of Habeas Corpus according to Order signed by Magistrate Judge John M. Dixon, Jr on 7/27/2009. Referred to Judge Oliver W. Wanger. Objections to FRdue by 8/31/2009. (Sant Agata, S)

1:08-cv-571 Electronically filed documents will be served electronically to:

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11-24-09

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF CALIFORNIA

MICHAEL CRAIG SLATER, Petitioner, v. WILLIAM SULLIVAN, et al., Respondents.	1:08-CV-00571 OWW JMD HC ORDER ADOPTING FINDINGS AND RECOMMENDATION [Doc. 20] ORDER GRANTING PETITION FOR WRIT OF HABEAS CORPUS ORDER DIRECTING CLERK OF COURT TO ENTER JUDGMENT

Petitioner is a state prisoner proceeding *pro se* with a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254.

The Magistrate Judge issued a Findings and Recommendation on July 27, 2009, recommending that the petition for writ of habeas corpus be GRANTED. The Magistrate Judge further recommended that the Clerk of Court be DIRECTED to enter judgment.

Respondent filed objections to the Findings and Recommendation on August 31, 2009.

Petitioner filed a response to Respondent's objections on September 8, 2009.

In accordance with the provisions of 28 U.S.C. § 636(b)(1)(C), this Court has conducted a *de novo* review of the case. Having carefully reviewed the entire file and having carefully considered the objections, the Court concludes that the Magistrate Judge's Findings and Recommendation is supported by the record and proper analysis. The Court modifies the Findings and Recommendation to include the following analysis in light of Respondent's objections. *See* 28 U.S.C. § 636(b)(1)(C) ("[a] judge of the court may accept, reject, or modify, in whole or in part, the findings or

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recommendations made by the magistrate judge").

A. Some Evidence Analysis

Respondent objects to the Magistrate Judge's Findings on the grounds that: (1) the Magistrate Judge erred in finding that the "some evidence" standard is applicable to this case; and (2) the Magistrate Judge erred in determining that the State court decision was unreasonable under the some evidence standard.

1. Applicability of Some Evidence Standard

Respondent's objections to the Findings and Recommendation raises the same argument previously contained in Respondent's answer: specifically, that there is no clearly established federal law requiring the application of the some evidence standard to the State's denial of parole. Respondent asks the Court to disregard the plethora of Ninth Circuit authority which holds that the some evidence standard is clearly established federal law and applicable to parole cases under AEDPA. *See, e.g., Sass v. Bd. of Prison Terms*, 461 F.3d 1123, 1129 (9th Cir. 2006) (applying some evidence standard). Respondent contends that the United States Supreme Court's precedents require only a hearing and a statement of reasons for the denial of parole. (Resp't. Objections at 3) (citing *Greenholtz v. Inmates of Nebraska Penak & Correctional Complex*, 442 U.S. 1, 16 (1979)).

Ninth Circuit precedent may be persuasive authority for purposes of determining whether a particular State court decision is an unreasonable application of Supreme Court law, and may also help determine what law is clearly established. *Sims v. Rowland*, 414 F.3d 1148, 1151 (9th Cir. 2005), *cert. denied*, 546 U.S. 1066 (2005). In *Sass*, the Ninth Circuit explicitly rejected the argument Respondent raises in its objections, stating:

> Hill's some evidence standard is minimal, and assures that "the record is not so devoid of evidence that the findings of the ... board were without support or otherwise arbitrary." (citation omitted). Hill held that although this standard might be insufficient in other circumstances, "[t]he fundamental fairness guaranteed by the Due Process Clause does not require courts to set aside decisions of prison administrators that have some basis in fact." (citation omitted). To hold that less than the some evidence standard is required would violate clearly established federal law because it would mean that a state could interfere with a liberty interest--that in parole--without support or in an otherwise arbitrary manner. We therefore reject the state's contention that the some evidence standard is not clearly established in the parole context

Sass, 461 F.3d at 1129.

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Additionally, the Court notes that Respondent fails to cite any district or Circuit authority for the proposition that the some evidence standard is not clearly established federal law in the parole context.[1] Rather, the Court's review has found that an overwhelming number of district courts, including this district, currently hold that the some evidence standard is the applicable law for parole cases. *Ramos v.* , 2009 WL 2425715, *3-4 (E.D. Cal. 2009) (applying some evidence standard); *Grant v. Salazar*, 2009 WL 2566947, *5-6 (C.D. Cal. 2009) (same); *Kler v. Board of Prison Terms*, 2009 WL 2591250, * 3-5 (E.D. Cal. 2009) (same). In light of the fact that no district court has rejected the some evidence standard as the applicable standard in parole cases, and given the Ninth Circuit's decisions in *Irons v. Carey*, 505 F.3d 846, 850-851 (9th Cir. 2007), *Sass v. California Board of Prison Terms*, 461 F.3d 1128-1129 (9th Cir. 2006) (finding some evidence standard is "clearly established in the parole context"), and *Biggs v. Terhune*, 334 F.3d 910, 914 (9th Cir. 2003), the Court finds Respondent's argument unpersuasive.

2. Application of the Some Evidence Standard

Respondent argues, in the alternative, that the Magistrate Judge incorrectly applied the some evidence standard. Respondent posits two arguments in support of this contention, contending that: (1) the Magistrate Judge should not have applied State law as errors of State law do not provide a ground for habeas corpus relief; and (2) there was some evidence to support the Board's denial of parole. As the Magistrate Judge's Findings and Recommendation already articulate the reasons why the Board's denial of parole was not supported by some evidence, the Court will only address Respondent's first contention.

While it is true that errors of State law are generally not grounds for habeas corpus relief, Respondent's argument ignores the unique nature of Petitioner's due process claim. The Due Process Clause of the United States Constitution does not confer on state prisoners a liberty interest in a parole release date. *E.g., Greenholtz*, 442 U.S. at 7 ("There is no constitutional or inherent right

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[1]Respondent cites *Hayward v. Marshall*, 512 F.3d 536, 542, 545, 547 (9th Cir. 2008), for the proposition that it is improper for this Court to rely on *Irons* and *Biggs* as those decisions form the foundation for *Hayward* and *Hayward* is being review en banc. The Court notes that Ninth Circuit rules forbid use of a decision currently being reviewed en banc as precedent. Further, the Court finds Respondent's argument both speculative and unpersuasive. The Ninth Circuit's review of *Hayward* does not implicate the ability of *Biggs* and *Irons* to serve as precedents.

of a convicted person to be conditionally released before the expiration of a valid sentence"). However, where a State statute creates a presumption that parole release will be granted, such a statute may create a legitimate expectation of release sufficient to invoke the protections of the Due Process clause. *See id.* at 12. Where, as here, the liberty interest at issue is State-created, it is axiomatic that a federal habeas court must evaluate a petitioner's claim within the framework of State law. As noted by the Magistrate Judge, the Ninth Circuit has held expressly that the inquiry of whether some evidence supports denial of parole to a prisoner requires federal courts to ascertain whether California statutes and regulations have been satisfied. *See Irons*, 505 F.3d at 851; *Biggs*, 334 F.3d at 915. Thus, a consideration of State law is pertinent in the parole context.

The California Supreme Court has interpreted California parole law to require that the some evidence standard be applied to the question of whether a prisoner poses a current risk of danger, stating that, "[t]he relevant determination for the Board and the Governor *is, and always has been*, an individualized assessment of the continuing danger and risk to public safety posed by the inmate." *In re Lawrence*, 44 Cal.4th at 1227 (emphasis added). The *Lawrence* court further noted that "current dangerousness (rather than the mere presence of a statutory unsuitability factor) is the focus of the parole decision is rooted in the governing statute." *Id.* at 1210-1211. More importantly, the State court applied this exact standard in Petitioner's case, stating that, "[t]his motive is materially less significant than those that conventionally drive people to commit murder; *therefore there is some evidence to support the Board's conclusion that petitioner continues to pose a risk of danger to society*." (Answer Ex. B at 2-3) (emphasis added). A federal habeas court must defer to a state court's interpretation of state law. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) (citing to *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) and *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)). Thus, the Magistrate Judge did not err in applying the some evidence standard to the inquiry of whether Petitioner poses a current risk of danger to the public safety.

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B. Improper Remedy

Respondent next contends that the remedy recommended by the Magistrate Judge is erroneous. The Magistrate Judge recommended that the remedy in this instant action be:

> Judgment be entered granting a writ of habeas corpus as follows: The Board shall find Petitioner suitable for parole at a hearing to be held within 30 days of the order adopting this decision, unless new evidence of his conduct in prison or change in mental status subsequent to the October 2005 parole consideration hearing is introduced that is sufficient to support a finding that Petitioner currently poses an unreasonable risk of danger to society if released on parole; and in the absence of any such new evidence showing Petitioner's unsuitability for parole, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has passed, Respondent shall, within ten (10) days of the Board's hearing, release Petitioner from custody. With respect to his presumptive period of parole, Petitioner is to be credited for any time that has lapsed since the release date calculated by the Board or when a finding of suitability at the October 2005 parole consideration hearing would have become final pursuant to California Penal Code sections 3041(b) and 3041.2(a)), whichever is later.

(Court Doc. 20 at 17-18).

Respondent contends that this remedy is erroneous because "even if a due process violation is found, the remedy should be limited to a new parole consideration review that comports with due process." (Resp't. Objections at 6) (citing *Benny v. U.S. Parole Comm'n*, 295 F.3d 977, 984-985 (9th Cir. 2002)). Respondent fails to acknowledge that *Benny* concerned whether the language of Title 18, United States Code, section 4211(c)(1) required an automatic termination or release as a violation of a prisoner's procedural rights contained in section 4211(c)(1). *Benny*, 295 F.3d at 982-983 (citing *Tatum v. Christensen*, 786 F.2d 959, 963 (9th Cir. 1986), *overruled by Wallace v. Christensen*, 802F.2d 1539, 1542 (9th Cir. 1986)). Thus, *Benny*'s holding is not as broad as Respondent contends, as nothing in *Benny* limits a federal habeas court's ability to grant the remedy of release on parole. Such a holding from *Benny* would be puzzling considering that the *Benny* Court found that habeas corpus was not the proper avenue for the petitioner to pursue a new parole consideration hearing. *Benny*, 295 F.3d at 989-990 (finding proper process was a writ of mandamus). More importantly, as recognized by Respondent, the Ninth Circuit has ordered the immediate release of a prisoner in an almost identical situation to the present case. In *McQuillion v. Duncan*, 342 F.3d 1012, 1016 (9th Cir. 2003), the Ninth Circuit ordered the immediate release of a prisoner whose parole rescission had not been supported by some evidence. Obviously, the ability of

a federal habeas court to grant a remedy is not confined to only granting a new parole consideration hearing.

Additionally, Respondent's citation to *Clifton v. Attorney General of the State of California*, 997 F.2d 660, 665 (9th Cir. 1974) is misguided as *Clifton* concerned a delayed parole hearing which would be best remedied by an actual hearing. Here, the remedy of a new parole consideration hearing would be futile. *See Milot v. Haws*, 628 F.Supp.2d 1152, fn. 3 (C.D. Cal. 2009) (stating, "the futility of remanding a parole case for "re-review" when the habeas court already has reviewed the evidence and found it insufficient to sustain an unsuitability finding has not escaped the state or federal courts" and listing for support of this contention *Blankenship v. Kane*, No. C 04-5450 CW, 2007 WL 2214102, at *3-*4 (N.D.Cal. July 30, 2007), *In re Aguilar*, 168 Cal.App.4th 1479, 1491 (Cal. Ct. App. 2008), *In re Burdan*, 169 Cal.App.4th 18, 39, 86 Cal.Rptr.3d 549 (Cal. Ct. App. 2008)).

A plethora of California cases have deemed the remedy suggested in the Magistrate's Findings and Recommendation to be the appropriate course of action in this situation. As stated by the California Court of Appeal in *In re Rico*, 171 Cal.App.4th 659, 688 (Cal. Ct. App. 2009), this is not a case of flawed methodology requiring re-weighing of the evidence on remand. Rather, the Court has found "an absence of evidence to support the BPH's unsuitability finding. Under these circumstances, 'to proceed in accordance with due process of law' does not mean the Board, or the Governor, is to be given an opportunity to reconsider the parole decision where there is not 'some evidence' in the record to support the unsuitability finding." *Id.* (quoting *In re Burdan*, 169 Cal.App.4th at 39). The California Court of Appeal has further noted that, in accordance with the California Supreme Court's decision in *Lawrence*, "when the reviewing court has determined there is no evidence in the record that would support the denial of parole, there is no reason to order the Board to conduct any further hearing on the matter, at least in the absence of some new evidence about the inmate's post-hearing conduct." *In re Gaul*, 170 Cal.App.4th 20, 40 (Cal. Ct. App. 2009) (citing *In re Singler*, 169 Cal.App.4th 1227, 1245 (Cal. Ct. App. 2008) (remedy after finding that Board's denial of parole is not supported by some evidence is order directing Board to find prisoner suitable for parole, unless *new evidence* of his conduct and/or change in mental state *subsequent to*

the 2006 parole hearing is introduced and is sufficient to support a finding that he currently poses an unreasonable risk of danger to society if released on parole") (emphasis in original)). The *Gaul* court thus ordered that the Board be directed "to find Gaul suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of Gaul's conduct in prison subsequent to his 2007 parole hearing supports a determination he currently poses an unreasonable risk of a danger to society if released on parole." *Gaul*, 170 Cal.App.4th at 40. Thus, there exists ample case law by California courts supporting the proposition that the Board's discretion may be limited in the manner recommended by the Magistrate Judge.

C. Motion for A Stay of Proceedings

Respondent argued that the Court should grant a stay of the proceedings, pending the outcome of the Ninth Circuit *en banc* review of *Hayward v. Marshall*, 512 F.3d 536 (9th Cir. 2008), *reh'g en banc granted*, 527 F.3d 797 (9th Cir. May 16, 2008).

The Ninth Circuit has acknowledged that this Court "may, with propriety, find it is efficient for its own docket and the fairest course for the parties to enter a stay of an action before it, pending resolution of independent proceedings which bear upon the case." *Leyva v. Certified Grocers of California Ltd.*, 593 F.2d 857, 863 (9th Cir. 1979). However, the Ninth Circuit has also determined that "once a federal circuit court issues a decision, the district courts within that circuit are bound to follow it and have no authority to await a ruling by the Supreme Court before applying the circuit court's decision as binding authority." *Yong v. Immigration and Naturalization Service*, 208 F.3d 1116, 1119 n. 2 (9th Cir. 2000). In addition, "habeas proceedings implicate special considerations that place unique limits on a district court's authority to stay a case in the interests of judicial economy." *Id.* at 1120. "Special solicitude is required because the writ is intended to be a 'swift and imperative remedy in all cases of illegal restraint or confinement.'" *Id.* (quoting *Fay v. Noia*, 372 U.S. 391, 400 (1963)). In *Yong*, the Ninth Circuit addressed an analogous situation where the district court issued a stay pending a decision from the Supreme Court. The Ninth Circuit found that although considerations of judicial economy are appropriate, they cannot justify an indefinite and potentially lengthy stay of a habeas proceeding. *Id.* at 1120-1121. Consequently, the Ninth Circuit ruled the district court abused its discretion in granting a stay.

In this case, Respondent requests that the Court stay the proceedings pending a decision in *Hayward*. Like *Yong*, such a stay would potentially be lengthy as it is not clear when the Ninth Circuit will issue its decision in *Hayward*, which has been pending for over a year. Additionally, the nature of this proceeding, a petition for writ of habeas corpus, implicates special considerations that limit the Court's authority to issue a stay. More importantly, though, there is ample binding precedent from the Ninth Circuit other than *Hayward* which speak to the issues in the petition and discussed in the Findings and Recommendation. *See Superintendent v. Hill*, 472 U.S. 445, 457 (1985); *Biggs*, 334 F.3d at 914; *Sass*, 461 F.3d at 1127-28; *Irons*, 505 F.3d at 851. Pursuant to *Yong*, 208 F.3d at 1119 n. 2, this Court has no authority to await a further ruling from the Ninth Circuit before applying these binding precedents.

D. Certificate of Appealability

Lastly, the Court notes that as Petitioner was challenging the denial of parole, a certificate of appealability, which is generally required under 28 U.S.C. section 2253(c), is not necessary to proceed on appeal to the Ninth Circuit. *See Rosas v. Nielsen*, 428 F.3d 1229, 1231-32 (9th Cir. 2005).

ORDER

Accordingly, IT IS HEREBY ORDERED that:

1. The Findings and Recommendation issued July 27, 2009, is ADOPTED IN FULL;
2. The Petition for Writ of Habeas Corpus is GRANTED;
3. The California Board of Parole Hearings shall find Petitioner suitable for parole unless, within 30 days of the finality of this decision, the Board holds a hearing and determines that new evidence of his conduct in prison or change in mental status subsequent to the October 2005 parole consideration hearing is sufficient to support a finding that Petitioner currently poses an unreasonable risk of danger to society if released on parole. In the absence of any such new evidence showing Petitioner poses a current risk of danger to society based on new evidence, the Board shall calculate a prison term and release date for petitioner in accordance with California law. Further, if the release date already has lapsed, Respondent shall, within 10 days of the Board's

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hearing, either release petitioner forthwith if his release date lapsed more than three years earlier, or release petitioner on parole for that period of his three year parole term that remains if the release date lapsed less than three years earlier;

4. Respondent's motion for a stay of the proceedings is DENIED; and

5. The Clerk of Court is DIRECTED to enter judgment.

IT IS SO ORDERED.

Dated: November 20, 2009

/s/ Oliver W. Wanger
UNITED STATES DISTRICT JUDGE

Westlaw

400 Fed.Appx. 224, 2010 WL 4117080 (C.A.9 (Cal.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 400 Fed.Appx. 224, 2010 WL 4117080 (C.A.9 (Cal.)))

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This case was not selected for publication in the Federal Reporter.

Not for Publication in West's Federal Reporter See Fed. Rule of Appellate Procedure 32.1 generally governing citation of judicial decisions issued on or after Jan. 1, 2007. See also Ninth Circuit Rule 36-3. (Find CTA9 Rule 36-3)

United States Court of Appeals,
Ninth Circuit.
Michael Craig SLATER, Petitioner–Appellee,
v.
William SULLIVAN, Warden, Respondent–Appellant,
and
James E. Tilton, Secretary of California Department of Corrections & Rehabilitation, Respondent.

No. 09–17784.
Argued and Submitted Oct. 5, 2010.
Filed Oct. 20, 2010.

Background: State prisoner petitioned for federal habeas relief, challenging state parole board's denial of parole. The United States District Court for the Eastern District of California, Oliver W. Wanger, J., adopting report and recommendation of John M. Dixon, United States Magistrate Judge, 2009 WL 2244189, granted petition. State appealed.

Holding: The Court of Appeals held that California requirement that "some evidence" of future dangerousness support parole board decision denying parole was "clearly established federal law," for purposes of federal habeas relief.

Affirmed.

Kleinfeld, Circuit Judge, filed dissenting opinion.

West Headnotes

Habeas Corpus 197 ⇐516.1

197 Habeas Corpus
197II Grounds for Relief; Illegality of Restraint
197II(B) Particular Defects and Authority for Detention in General
197k516 Pardon and Parole
197k516.1 k. In general. Most Cited Cases

California requirement that "some evidence" of future dangerousness support parole board decision denying parole was "clearly established federal law," for purposes of federal habeas relief, and thus Antiterrorism and Effective Death Penalty Act did not preclude habeas petitioner's claim for relief on that basis. 28 U.S.C.A. § 2254.

*224 Marc Grossman, Law Offices of Marc E. Grossman, Upland, CA, for Petitioner–Appellee.

Krista Leigh Pollard, Deputy Attorney General, Office of the California Attorney General, Sacramento, CA, for Respondent–Appellant and Respondent.

Appeal from the United States District Court for the Eastern District of California, Oliver W. Wanger, District Judge, Presiding. D.C. No. CV 08–00571–OWW–JMD.

Before: KLEINFELD and GRABER, Circuit Judges, and MOLLOY,[FN*] District Judge.

FN* The Honorable Donald W. Molloy, United States District Judge for the District of Montana, sitting by designation.

*225 MEMORANDUM [FN**]

FN** This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

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400 Fed.Appx. 224, 2010 WL 4117080 (C.A.9 (Cal.))
(Not Selected for publication in the Federal Reporter)
(Cite as: 400 Fed.Appx. 224, 2010 WL 4117080 (C.A.9 (Cal.)))

****1** Respondent William Sullivan, Warden, (the "State") appeals the district court's grant of Petitioner Michael Craig Slater's habeas corpus petition under 28 U.S.C. § 2254. The district court held that the State deprived Petitioner of his right to due process when he was denied parole in the absence of "some evidence" of current dangerousness as required by California law. On de novo review, *Buckley v. Terhune*, 441 F.3d 688, 694 (9th Cir.2006) (en banc), we affirm.

In a series of recent cases, we have rejected the State's argument that the Antiterrorism and Effective Death Penalty Act of 1996 precludes relief on Petitioner's claim because California's "some evidence" requirement is not "clearly established federal law." *Hayward v. Marshall*, 603 F.3d 546, 563 (9th Cir.2010) (en banc); *Cooke v. Solis*, 606 F.3d 1206, 1213 (9th Cir.2010); *Pearson v. Muntz*, 606 F.3d 606, 608–09 (9th Cir.2010) (per curiam). The State argues, in essence, that those cases were wrongly decided, but they bind this three-judge panel. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir.2003) (en banc).

The State does not argue that the Board of Parole Hearings' decision was, in fact, supported by some evidence. We therefore do not consider that question. *See Smith v. Marsh*, 194 F.3d 1045, 1052 (9th Cir.1999) (holding arguments not raised in the opening brief generally are waived).

AFFIRMED.

KLEINFELD, Circuit Judge:

I respectfully dissent. The district court's grant of the writ was based on a line of reasoning that was rejected by our court earlier this year in *Hayward v. Marshall*, 603 F.3d 546, 559–61 (9th Cir.2010) (en banc). The recent applications of *Hayward* in *Pearson v. Muntz*, 606 F.3d 606 (9th Cir.2010) (per curiam), and *Cooke v. Solis*, 606 F.3d 1206 (9th Cir.2010), do not purport to overrule *Hayward*, nor could they, since they are not en banc. *Hayward* did "not decide whether a right arises in California under the United States Constitution to parole in the absence of some evidence of future dangerousness." *Hayward*, 603 F.3d at 562. It cannot be read to allow for us to become something akin to a state parole board or appellate court. *See* Antiterrorism and Effective Death Penalty Act of 1996, 28 U.S.C. § 2254(d)(1–2); *Estelle v. McGuire*, 502 U.S. 62, 72, 112 S.Ct. 475, 116 L.Ed.2d 385 (1991).

In this case, the California superior court assessed the distinct rationales given by the Board of Parole Hearings, addressed the most direct and on-point rationale that was not out of bounds under its state's case law, and concluded that Slater was currently dangerous because his repeated explanation for the murder showed a current state of mind indicating that he would be dangerous if released. *See In re Scott*, 119 Cal.App.4th 871, 15 Cal.Rptr.3d 32, 40 (2004). In addition to the crime of conviction and his continuing failure to take responsibility, the parole board's finding of future dangerousness was supported by Slater's escalating pattern of criminal behavior before he came to prison, and his "tenting" infraction while he was imprisoned. We are not at liberty to disregard "tenting" as though it were insignificant***226** evidence of future dangerousness. The parole board took explicit notice of it, no doubt because "tenting" is both an infraction and a possible means by which prisoners may shield themselves from surveillance while they commit more serious infractions and crimes. The superior court did not purport to reject any of the parole board's reasons for denying parole, although it did not mention them all.

****2** The summary affirmances by California's court of appeal and supreme court indicate that the reasons given by the parole board and superior court are enough to satisfy California's "some evidence" standard of review. *See In re Lawrence*, 44 Cal.4th 1181, 1214, 82 Cal.Rptr.3d 169, 190 P.3d 535 (2008) (noting that the inmate's criminal offense alone cannot establish his current dangerousness "unless the record also establishes that something in the prisoner's pre- or post-in-

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carceration history, or his or her current demeanor and mental state" supports an inference of dangerousness), *In re Shaputis*, 44 Cal.4th 1241, 82 Cal.Rptr.3d 213, 190 P.3d 573 (2008) (same). There is no showing that California violated the holdings of the Supreme Court, or made an unreasonable determination of the facts in light of the evidence. *See* 28 U.S.C. § 2254(d)(1–2); *Hayward*, 603 F.3d at 559–61.

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